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No.

IN THE

Supreme Court of the United States

Paul Viriyapanthu,

Petitioner

v.

Regents of the University of California

Respondents

On Petition For Writ Of Certiorari
To The Second District Court of Appeals,
For the State of California
Division Seven

Paul Viriyapanthu
Petitioner, in Pro Per
12072 Henry Evans Drive
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QUESTIONS PRESENTED

Nearly thirty years ago, this court decided Goss v. Lopez (1975) 419 U.S. 565 holding that the due process clause required a hearing prior to the suspension of a student from a public school. In Goss, this Court required only 'an informal give and take' session between student and disciplinarian; but specifically noted that the Goss decision was a limited holding applicable to suspensions of 10 days or less and that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." Goss 419 U.S. at 584. In the subsequent 30 years, this Court has not revisited the issue in the context of long-term suspensions or expulsions, leaving the lower courts to determine on their own what these more formal procedures may entail, with varying results.

Similarly, in 1972 this court decided the case of Roth v. Board of Regents (1972) 408 U.S. 564 involving the termination of a university professor. In Roth, this court held that a governmental employee who is terminated as a result of stigmatizing charges that could preclude future employment opportunities is entitled to a hearing, in order to refute these charges.

The questions presented in this petition are as follows:

1. Whether it was error for the court below, in conflict with decisions of federal courts of appeals and state supreme courts, to hold that a student facing expulsion or long term suspension from a public university is only entitled to an opportunity to "explain his side of the story" to a school official, and has no right to present evidence and witnesses at, nor can insist upon, even an *informal* adjudicative type hearing?

2. Whether a law student, disciplined from a public law school on a charge which constitutes a finding of moral turpitude, and which could preclude future employment and educational opportunities, faces the same stigma as a terminated governmental employee as to implicate the so-called "occupational liberty" line of cases begun by Roth v. Board of Regents, such as to justify even an informal hearing, with the ability to present evidence and witnesses, to challenge any allegations of "dishonesty"?

TABLE OF CONTENTS

Page

JUDGMENT FOR WHICH REVIEW IS SOUGHT 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, OR OTHER LEGAL PROVISIONS 2

STATEMENT OF THE CASE 2

I. INTRODUCTION 2

II. THIS CASE IS A PURE MATTER OF LAW AS THE UCLA CODE DOES NOT AFFORD A STUDENT AN ADJUDICATIVE HEARING AS A MATTER OF 'RIGHT' 3

III. UCLA STUDENT POLICIES PROHIBIT A STUDENT FROM DIRECTLY CHALLENGING ALLEGATIONS OF 'DISHONESTY' 8

IV. THE LOWER COURTS' RULING HELD THAT A STUDENT FACING EXPULSION OR LONG TERM SUSPENSION IS NOT ENTITLED TO AN ADJUDICATIVE HEARING BUT IS ONLY ENTITLED TO 'AN OPPORTUNITY TO TELL HIS SIDE OF THE STORY' TO SCHOOL OFFICIALS 10

V. BOTH THE CALIFORNIA TRIAL AND APPELLATE COURT IGNORED CLEARLY ESTABLISHED U.S. SUPREME COURT PRECEDENT BY REQUIRING PETITIONER TO DEMONSTRATE 'CERTAIN SUCCESS' HAD THERE BEEN A HEARING AND MISCONSTRUING THE PURPOSE OF THE HEARING. 11

REASONS FOR GRANTING THE PETITION 15

I. THE QUESTION OF DUE PROCESS IN CONNECTION WITH A LONG TERM SUSPENSION OR EXPULSION HAS NEVER BEEN RESOLVED BY THIS COURT RESULTING IN THE GENERATION OF AN INORDINATE AMOUNT OF CASES... 15

A. The Supreme Court Has Never Adjudicated the Issue of Due Process in Long-Term Supsensions or Expulsions *15*

B. There Are an Inordinate Amount of Student Discipline Cases Generated As a Result of the Lack of Guidance by the Supreme Court *16*

II. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER THE 'INFORMAL GIVE AND TAKE SESSION WITH A SCHOOL OFFICIAL' FORMULATED IN GOSS V. LOPEZ IS SUFFICIENT DUE PROCESS IN THE CONTEXT OF LONG TERM SUSPENSIONS OR EXPULSIONS 17

A. There Is a State of Confusion in the Lower State and Federal Courts *17*

A. The Results Would Have Been Different Had This Matter Been Heard in Petitioner's Federal Court *20*

B. The Texas Supreme Court and Other State Courts Have Come to Different Results as the California Courts *21*

C. Other Federal Circuit Courts Have Held that Due Process in Connection with a Long Term Suspension or Expulsion is Not Satisfied by an "Opportunity for a Student to Present His Side of The Story" and Have Required an Adjudicative Type Hearing with the Ability to Present Evidence and Witnesses *23*

D. Courts Which Have Held That Due Process Does Not Require An Adjudicative Hearing and Only Affords A Student the Opportunity to Present His Side of The Story Even When Sanctions Are Long-Term Suspension or Expulsion. *26*

E. Because of Its Unique Circumstances, This Case Is Particularly Suitable for Review *29*

CONCLUSION **30**

Cases

Black Coalition v. Portland School District (1973, CA 9 Or) 484 F.2d 1040 at 1045 21
Bundick v. Bay City Independent Sch. Dist (S.D. Tex. 2001) 140 F. Supp.2d 745 25
Butler v. Oak Creek-Franklin School District (2002 Dc. Or.) 172 F. Supp.2d 1102 14
Carey v. Piphus (1978) 435 U.S. 247 at 266 ..... 13, 14, 23, 24
City of Santa Monica v. Regents of the University of California (1978) 77 Cal. App. 3d 130 3
Cleveland Board of Education v. Loudermill (1985) 470 U.S. 532 at 544 ..... 13, 14, 15, 30
Corso v. Creighton University (1984, CA8 Neb) 731 F2d 529 25
Dillon v. Pulaski County Special School Dist. (1979 8th Cir.) 594 F.2d 699 25
Draper v. Columbus Public Schools (1991, SD Ohio) 760 F. Supp. 131 26
Expulsion of E.J.W. from Independent School Dist. No. 500 (Minn. Ct. App. 2001) 632 N.W.2d 775 ..... 22, 23
Gamble v. Ware County Bd. of Education (2002) 253 Ga. App. 81928
Gardenhire v. Chalmers (1971, DC Kan) 326 F. Supp. 1207 26
Gonzales v. McEuen (1977 CD Cal.) 435 F. Supp. 460 20
Gorman v. University of Rhode Island (1st Cir. 1988) 837 F.2d 7... 27
Goss v. Lopez (1975) 419 U.S. 565 ..... passim
Graham v. Knutzen (1972, DC Neb) 351 F. Supp. 642 26
Hagopian v. Knowlton (1972, CA 2NY) 470 F.2d 201 26
Hobson v. Bailey (1970, WD Tenn) 309 F. Supp. 1393 26
J.S. v. Bethlehem Area School Dist. (Pa. Commw. Ct. 2002) 794 A.2d 936 23
John A. v. City Unified School District (1982 Cal. Sup.Ct.) 33 Cal. 3d 301 18
Killion v. Franklin Regional School Dist., (W.D. Pa. 2001) 136 F. Supp. 2d 446 25
Lamb v. Panhandle Community Unit School Dist (1987, CA7 Ill.) 826 F.2d 526 24
London v. Directors of De Witte Public Schools (1999) 194 F.3d 873 25
Newsome v. Batavia Local School Dist. (1988 6th Cir.) 842 F.2d 920 24

Remer v. Burlington Area School District (7th Cir. 2002) 286 F.3d 1007 24
Rhyne v. Childs (1973, ND Fla) 359 F. Supp. 1085 26
Ross v. Disare (1977, SD NY) 500 F. Supp 928 26
Roth v. Board of Regents (1972) 408 U.S. 564 ..... i, 10
Stone v. Prosser Consol. School Dist. No. 116 (Div. 3 1999) 94 Wash. App. 73 23
University of Tex. Medical Sch. V. Than (1995 Tx. Sup.Ct.) 901 S.W.2d 926 ..... 21, 22
Vought v. Van Buren Public Schools (1969, ED Mich) 306 F. Supp 1388 26
Watson v. Beckel (2001 10th Cir.) 242 F.3d 1237 ..... 27, 28
Winnick v. Manning (2d Cir. 1972) 460 F.2d 545 28

Articles

Fernand N. Dutile, "Students and Due Process in Higher Education: Of Interests and Procedures" 2 Fl. Coastal L.J. 243 at 288-289. ... 19

James M. Picozzi, "University Disciplinary Process: What's Fair, What's Due, and What You Don't Get", 96 Yale L.J. 2132 at 2134 18

E.H. Schopler, "Right of Student to Hearing on Charges Before Suspension or Expulsion from Educational Institution, 58 A.L.R. 2d 903 ..... 19, 30

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is: *Paul Viriyapanthu v. Regents of the University of California*, Los Angeles Superior Court Case Number: BS 071888. After a bench trial, the Superior Court of Los Angeles denied Paul Viriyapanthu's petition for a writ of mandamus to set aside student discipline imposed upon Mr. Viriyapanthu while a student at the University of California at Los Angeles due to violation of due process. This suit was brought pursuant to California Code of Civil Procedure § 1094.5 ("writ of administrative mandate") which authorizes a California Superior Court to review the propriety of actions of a lower state administrative agency, in this instance the University of California, in the capacity of an appellate court based solely upon review of the administrative record. The trial court's opinion is unpublished and is reproduced in the Petition Appendix ("Pet. App.") at pages A-1. The case was appealed to the California 2nd District Court of Appeal, which affirmed the decision, Case No. B 157836. The Court of Appeal's decision is unpublished and is reproduced in the Petition Appendix at pages A-4. Petitioner submitted a petition for reconsideration based upon the Appellate Court's misstatement of fact, specifically that Petitioner was *dismissed* not suspended, and that the evidence that Petitioner would have submitted had there been an adjudicative hearing was the testimony of other professors which would have testified that Mr. Viriyapanthu's actions did not constitute plagiarism. The Petitioner for reconsideration was denied, in an unpublished decision. The Appellate court's order denying reconsideration is reproduced at pages A-19. Petitioner, filed a petition for certiorari with the Supreme Court of the State of California. The petition was denied on December 10, 2003, in an unpublished decision which is reproduced in the Petition Appendix at pages A-20.

JURISDICTION

The order of the Supreme Court of the State of California was entered on December 10, 2003. This Court has jurisdiction under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL, STATUTORY, OR OTHER LEGAL PROVISIONS

Petitioner Paul Viriyapanthu's claim is based upon the due process clause of the 5th Amendment of the United States Constitution, made applicable to the state of California by the 14th Amendment of the United States Constitution. The matter was heard pursuant to statute, California Code of Civil Procedure §§ 1085 & 1094.5, which authorizes a California Superior Court to review the legality of any action by a lower state administrative agency, in this case the Regents of the University of California. California Code of Civil Procedure §§1085 & 1094.5 is reproduced in the Petition Appendix at A-21.

STATEMENT OF THE CASE

I. INTRODUCTION

This case is a student discipline matter involving petitioner Paul Viriyapanthu, who was a student at the University of California at Los Angeles School of Law (hereinafter "UCLA"). During petitioner's second year of law school, Mr. Viriyapanthu was retroactively suspended (meaning all earned credit for that semester were erased after completion) and dismissed from the law school on a charge of plagiarism. Mr. Viriyapanthu subsequently petitioned to be readmitted to the law school, and has since graduated. However, a finding of academic dishonesty committed during law school constitutes a finding of moral turpitude which has precluded him from governmental employment from positions requiring a background security screening, resulted in his rejection from graduate school programs to which he has applied, and has hampered his ability to be admitted to practice law. As a result, Mr. Viriyapanthu initiated suit to have the law school findings of academic dishonesty invalidated, the results of which this petition arises from.

In this instance, it is undisputed that no adjudicative type hearing was held petitioner was not afforded an opportunity to present evidence or witnesses on his behalf. Petitioner's sole 'due process' consisted of meeting with a university official. The lower courts both held that due process, even for dismissals or long term suspension, requires only that petitioner be given "opportunity to tell his side of the story," and that Petitioner was not entitled to present evidence or

witnesses. Appellate court opinion at Petition Appendix (Pet. App. A-4.)

The question presented in this petition is a simple one: does a student facing expulsion or long term suspension have a due process right to present evidence and witnesses at even an informal adjudicative hearing to refute the charges? Or, in the alternative, is the 'hearing' requirement articulated in Goss v. Lopez (1975) 419 U.S. 565 satisfied by affording a student the "opportunity to present his side of the story to school officials"? Even the trial court noted that this matter was "a pure question of law to be decided under due process principles, the issues being what process is due." Trial court opinion at Pet. App. page A-2.

II. THIS CASE IS A PURE MATTER OF LAW AS THE UCLA CODE DOES NOT AFFORD A STUDENT AN ADJUDICATIVE HEARING AS A MATTER OF 'RIGHT'

The case represents a pure matter of law because the UCLA Student Conduct Code, which governs student discipline proceedings, does not afford a student an adjudicative hearing, with the ability to present evidence or witnesses on his own behalf, as a matter of 'right'.[1] Furthermore, it is undisputed in both the trial court and appellate decision that no evidence or witnesses were presented by petitioner. In this instance, there is no allegation that university officials did not adhere to the procedures outlined by the school's own regulations. Rather, the challenge here is whether the regulations, which hold that a student's 'hearing' is satisfied with a meeting with a school official, are sufficient under due process as outlined in this court's decision in Goss v. Lopez.

It should be noted that the UCLA Student Conduct Code *does* have a provision for an adjudicative type hearing, with the student afforded the ability to present evidence and witnesses, and even allowed to be represented by counsel. Under UCLA Student Conduct Code, II B. 2, the University maintains a standing committee of five members (two faculty, two students, and one alternate) which

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[1] It should also be noted that the University of California is an independent branch of California government created by the California Constitution, and, as such, the California courts have held that regulations enacted by the University of California carry the force of statute. City of Santa Monica v. Regents of the University of California (1978) 77 Cal. App. 3d 130

comprise the Student Conduct Committee. Pet. App. at A-30. If a hearing is conducted before the Student Conduct Committee, the student is entitled to be represented by an attorney and the code states that:

> "hearings shall be held in accordance with generally accepted standards of procedural due process, including, but not limited to, the opportunity to present evidence in an orderly manner, and the right to examine and cross-examine witnesses." UCLA Student Conduct Code III. B. 4, Pet. App. A-31.

The reason why Mr. Viriyapanthu was not permitted to have a hearing before the Student Conduct Committee forms the heart of petitioner's due process complaint. In this instance, the reviewing dean who conducted the initial interview with petitioner summarily found him guilty and made the determination that no hearing before the Student Conduct Committee would take place.

Under the UCLA Student Conduct Code (relevant portions which is produced Petition Appendix A-23) all complaints of academic dishonesty made by instructors are forwarded to the UCLA Student Affairs Office (hereinafter "SAO"), which is the central office and handles *all* student disciplinary matters for the campus. Pursuant to UCLA Student Conduct Code III A.6., attached hereto at Pet. App. A-27, the assigned SAO Dean is to schedule an initial interview with the student. During the meeting, the interviewing Dean may choose among three different outcomes.

First, the Dean may determine that there is insufficient evidence and dismiss the matter. In the alternative, the Dean may forward the matter to the Student Conduct Committee for a full evidentiary hearing (with the ability to present evidence and witnesses), which is what petitioner desired. Finally, the Dean is also empowered to summarily find a student guilty if the Dean determines that a student has made sufficient statements as to constitute an 'admission of culpability'.

A reading of the UCLA Student Conduct Code, with particular attention to section II A.6.d, (pet. app. A-28) will reveal that the student has no 'choice' in whether a hearing before the Student Conduct Committee will occur. The Dean is not required to ask the student's permission to forego the hearing or even ask the student whether he would like a hearing. In other words, the determination

whether a hearing before the Student Conduct Committee will occur or whether sanctions will be summarily imposed is within the sole discretion of the reviewing dean.

In this instance, Mr. Viriyapanthu was not aware that his statements were sufficient to constitute an 'admission of culpability', and would result in the denial of a hearing before the Student Conduct Committee. During the initial meeting with UCLA Dean Kathleen McMahon, petitioner was asked by the Dean to explain his version of events. Mr. Viriyapanthu explained that he had been too overwhelmed with work to have properly proofread the paper, but did not believe he was committing plagiarism at the time based on his understanding of the rules of citation.

Furthermore, it should be noted that this version of events is essentially not in dispute as the testimony of University Officials themselves supports petitioner's contention:

> According to UCLA Dean Cheadle, "Viriyapanthu admitted that his work was 'fast and loose,' *but denied that he had committed plagiarism* [emphasis added], saying he had not intended to deceive; he had simply been under time pressure to complete his work for the semester and had been careless'". Appellate court opinion, pet. app. at A-6.

Similarly Dean Kathleen McMahon (the dean who made the decision that no hearing before the Student Conduct Committee would occur) stated:

> "Viriyapanthu also 'stated that he had not intended to plagiarize by his conduct. He said he was rusty on the rules for papers and that his work had been hasty and sloppy." Appellate court opinion pet. app. at A-9.

However, because Mr. Viriyapanthu stated that he should have reviewed the paper more thoroughly, the interviewing Dean determined that he had "made an admission of culpability", despite the fact that Mr. Viriyapanthu claimed that his actions were inadvertent. Simply put, petitioner was unaware that these statements were sufficient to forego his hearing before the Student Conduct Committee, as he believed that he would still be afforded a hearing as he did not admit an intent to deceive.

It should be noted that prior to the initial meeting with Dean Kathleen McMahon, Mr. Viriyapanthu had been informed that the meeting would be an "initial meeting[,]...informal in nature, in order

to explain university procedures to [him], and for [him] to explain any relevant information as a precursor to [a] hearing before the Student Conduct Committee." Appellate Court Opinion pet. app. at A-8.[2] As such, Mr. Viriyapanthu did not believe he should be guarded with his statements at the peril of losing such a hearing.

In addition, Mr. Viriyapanthu did not believe he was 'admitting culpability' (and believed that he would still receive a hearing before the Student Conduct Committee) since he did not admit to intentional dishonesty. Petitioner's belief was based on the Student Conduct Code definition of 'plagiarism' itself, which defines plagiarism as:

> "either with the *intent* to deceive or by the omission of the true source"..."*representing* the identifiable but altered ideas, data or writing of another person...as if those ideas, data or writing were the student's original work". Appellate Court Opinion at Note 2, Pet. App. at A-7.

Petitioner does not believe he was unreasonable in his belief as the terms 'intent' and 'representing' seem to indicate an element of *mens rea* in the definition of the offense.

The point here is that if there is a 'right' to present evidence and witnesses at a hearing, then only the holder of that right, the student, may make a waiver. If a student possesses such a 'right' to a hearing, then a school may not delegate authority to its officials to waive these rights on someone else's behalf. However, under the UCLA Student Conduct Code it is solely within the discretion of the interviewing dean whether or not such a hearing will be held. There is no provision in the UCLA Student Conduct Code that a student

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[2] This understanding was based on email communications between Petitioner and University Officials. A September 24, 1999 email informed petitioner that he "should expect to hear from Dean Porter very soon; he will ask you to schedule a meeting and will *explain* the university's process in these matters to you." [Emphasis added.] Appellate Court opinion at pet. app. 7. Similarly, when Mr. Viriyapanthu contacted the SAO Office he reiterated his understanding of this meeting when he requested an extension: "[a]s I understand it I am entitled to bring my own legal representative at the hearing, and at this meeting with you the formal rules of the proceeding will be discussed, I thought it best to bring counsel with me so he could ask any questions about the procedures directly to you instead of hearing them second hand from me." Appellate court opinion at pet. app. 8. There was no evidence introduced that University officials informed or otherwise corrected Mr. Viriyapanthu's belief that the purpose of the hearing was to explain procedures before the Student Conduct Committee.

must agree before being deprived of an adjudicative type hearing before the Student Conduct Committee, nor is there any procedure by which a student can compel any such hearing to take place.

Petitioner's claim is that he did not willingly and voluntarily 'choose' to forego the opportunity to present evidence and witnesses, and should have been afforded such a hearing. Instead, such opportunity was taken without his consent by the dean, despite his protests, and he was coerced to make statements for his file.

One of the main tenets of Constitutional law is that an individual is afforded certain rights that act as a procedural safeguard against arbitrary governmental action. The standard has been very clear that in order to divest an individual of these safeguards, it must be demonstrated that a knowing, intelligent and, voluntary waiver of these rights was made as opposed to a waiver made unwittingly. In this instance, Mr. Viriyapanthu should have been given the choice as to whether he wished to retract his statements and challenge the accusation of plagiarism before the Student Conduct Committee.

In addition, it was clear that during this 'hearing' before the UCLA Dean no evidence or witnesses were presented. The reviewing Appellate Court notes this fact on page A-16 to A-17 of the opinion but places the blame upon Petitioner for failing to familiarize himself with the UCLA regulations and presenting evidence during this meeting with the dean.[3] However in doing so, the court overlooked the fact that there is *no provision* in the UCLA Student Conduct Code for presenting evidence during the meeting with the SAO Dean.

The initial meeting with the UCLA Dean is detailed in UCLA Student Conduct Code III.A.4. ("Interview(s) with the Dean Assigned to the Case"). The Code only notes that during this meeting:

> "The Dean assigned to the case shall, at the initial interview:
>
> a. Ascertain that the student has received a copy of this code...b. discuss confidentiality...c. describe to the student as

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[3] "Viriyapanthu argues the notice he received was insufficient because he did not know the meeting with Dean McMahon was his only opportunity to present evidence and argument in his defense. He believed he would be afforded a hearing before the Student Conduct Committee. Viriyapanthu was on notice of the procedures for disciplinary matters and the definition of plagiarism, as set forth in the Student Conduct Code. He cannot blame the University for his own failure to familiarize himself with these procedures as well as the rules and regulations of the University." Trial Court Opinion at pet. app. A-16 to A-17.

> completely as possible the nature of the conduct in question…d. provide the student with an opportunity to inspect all documents relevant to the case…[and] e. provide the student with copies of the documents relevant to the case…" Pet. app. A-27 to A-28.

The Code makes no mention about the student presenting evidence, or bringing witnesses before the interviewing dean; the only provision in the Student Conduct Code for doing so is during the hearing before the Student Conduct Committee.

Finally, it should also be noted that during the meeting, Mr. Viriyapanthu made a specific request to the reviewing Dean to have the matter forwarded to the Student Conduct Committee for hearing. This request was denied. Mr. Viriyapanthu was ordered to write a statement for his file and an apology letter to the instructor. During the meeting, Mr. Viriyapanthu was informed that unless he complied, he would be permanently expelled.

The issue of whether Mr. Viriyapanthu 'voluntarily' chose to forego his hearing or whether the statement written by petitioner was made under coercion under threat of permanent expulsion was not addressed in either the trial court or appellate court decisions. Instead, the issues were made moot by the lower courts' holding that petitioner had no 'right' to present evidence or witnesses in the first place. At Note 4, the Appellate court noted that Petitioner's "assertion he wrote the statement and letter of apology 'under coercion and duress,' even if true, would have no bearing on our decision in this matter." Appellate Court Opinion at Note 4. Pet. App. at A-10.

III. UCLA STUDENT POLICIES PROHIBIT A STUDENT FROM DIRECTLY CHALLENGING ALLEGATIONS OF 'DISHONESTY'

UCLA Student policies are fundamentally unfair because they prohibit a student from directly challenging the allegations of 'dishonesty' leveled against him. 'Plagiarism' is listed under UCLA Student Conduct Code II. C. 102.01c as a form of 'academic dishonesty.' Pet. app. at page A-25 to A-26. In addition, both the reviewing Dean, Kathleen McMahon, and UCLA's Vice Chancellor,

Winston Doby, both wrote incident reports, placed in Petitioner's student file, which specifically state that they found Mr. Viriyapanthu's actions to be deliberately and wanton dishonesty.

When Mr. Viriyapanthu attempted to apply for to be admission to the bar, the California application, like the majority of other jurisdictions, requires that an applicant disclose any student discipline which constitute a finding of moral turpitude in addition to signing a release authorizing the applicant's school to produce his entire student file. When Mr. Viriyapanthu applied to graduate educational programs, he was also required to disclose any student discipline and authorize the school to release his records. Similarly, when Mr. Viriyapanthu applied for employment for government positions which required a security clearance, he was also required to disclose any student discipline which constitutes a finding of moral turpitude. As a result, petitioner has been rejected from many future opportunities as a result of the school's findings of 'dishonesty'.

The fact remains that at no time did Mr. Viriyapanthu ever admit to being 'dishonest'. At all times, petitioner maintained that his actions were inadvertent, being the result of time constraints and his understanding of the rules of citation. However, despite petitioner's denials, he never was allowed to present evidence or witnesses as to the issue of whether he was, in fact, 'dishonest'.

Petitioner's argument is that intent is an inherently necessary element in being 'dishonest.' It is impossible to refute a charge of 'dishonesty' if the individual charged cannot present any exculpatory evidence as to intent. University officials are clearly labeling and telling the world at large that Mr. Viriyapanthu is a 'dishonest' individual, but this is an assertion that they have not even given Petitioner the opportunity to refute. This is not a situation where a tribunal of university officials, upon considering petitioner's evidence, made a determination of an intent to deceive. This is a situation where Mr. Viriyapanthu was precluded altogether precluded from introducing any evidence as to why he believed his actions were reasonable.

This matter falls directly under the rubric of the so-called 'occupational liberty' line of cases, begun by Roth v. Board of Regents (1972) 408 U.S. 564 where the federal courts have held that if the government makes a stigmatizing charge in connection with the termination of an employee, that employee is entitled to an

opportunity to refute these charges. In Roth, allegations of 'dishonesty' were specifically noted as implicating this right:

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in the community. It did not base the renewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. For 'where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential" [Citations omitted.] In such a case, due process would accord an opportunity to refute the charge before University Officials. Roth v. Board of Regents (1972) 408 U.S. 564 at 573.

IV. THE LOWER COURTS' RULING HELD THAT A STUDENT FACING EXPULSION OR LONG TERM SUSPENSION IS NOT ENTITLED TO AN ADJUDICATIVE HEARING BUT IS ONLY ENTITLED TO 'AN OPPORTUNITY TO TELL HIS SIDE OF THE STORY' TO SCHOOL OFFICIALS

In its ruling, the trial court specifically rejected petitioner's claim that Mr. Viriyapanthu, as a student facing expulsion/long term suspension, was entitled to an adjudicative type hearing with the ability to present evidence and witnesses. Both courts held that the fact that Petitioner did not receive a hearing before the Student Conduct Committee was of no consequence as he was not entitled to such a hearing in the first place:

> "Petitioner's main contention appears to be that he was entitled to, but denied, a full evidentiary hearing at the administrative level, "including, evidence, witnesses, and mitigating factors." (Reply Brief 9:21-23). This contention presents a pure question of law to be decided under due process principles, the issue being what process is due. None of the authorities cited by petitioner holds, or even implies, that an educational institution must hold a judicial-type hearing...petitioner was granted all of the process that was due to him. He was given notice of the charges against him and an opportunity to tell his side of the story. Nothing more is required." Trial Court Opinion at pet. app. A-2.

Similarly, the California 2nd Appellate Court of Appeals, in affirming the decision, also held that a student has no due process 'right' to present evidence or witnesses in connection with an expulsion or-long term suspension:

> "Viriyapanthu alleges the University violated his right to procedural due process by failing to afford him proper notice and a hearing before it suspended him. The trial court denied the petition, concluding the University complied with due process requirements by giving Viriyapanthu notice of the charge against him and an opportunity to present his side of the story. We affirm." Appellate Court opinion at Pet. App. A-4.

> "Courts have referred to Goss v. Lopez as the 'starting point' in an analysis of procedural due process requirements in student misconduct, public school suspension matters. In that case, the United States Supreme Court decided what process is due in a case which numerous public high school students were suspended for less than 10 days during 'a period of widespread student unrest" (students were 'demonstrating' and creating various 'disturbances'). The court concluded public school 'students facing suspension...must be given *some* kind of notice and afforded *some* kind of hearing.' So long as there is 'effective notice' and 'an informal give-and-take between student and disciplinarian,' the court left to the discretion of the disciplinarian whether to permit the presentation of witnesses, cross-examination, etc." Appellate Court opinion at pet. app. A-14.

V. BOTH THE CALIFORNIA TRIAL AND APPELLATE COURT IGNORED CLEARLY ESTABLISHED U.S. SUPREME COURT PRECEDENT BY REQUIRING PETITIONER TO DEMONSTRATE 'CERTAIN SUCCESS' HAD THERE BEEN A HEARING AND MISCONSTRUING THE PURPOSE OF THE HEARING.

As a part of their rationale in rejecting Petitioner's claim that he had a right to present evidence and witnesses, the trial court and reviewing appellate court both noted that this argument was unpersuasive because Petitioner could not demonstrate that he would have been successful had a hearing occurred. The trial court noted:

> "Petitioner also seems to complaint that he was denied a 'fair trial' because he was 'promised' an evidentiary hearing, but was never given one. The contention has no merit because petitioner fails to prove that any such promise was made, and because petitioner fails to show what evidence he could have presented that might have saved him from the punishment that was imposed upon him." Trial court opinion at pet. app. A-2 to A-3.

Similarly, the appellate court noted:

> "The 'opportunity to question witnesses' is not a key element of due process in a case 'where the proof is found in facts objectively discerned and not on inference from personal observations'....Appellate court opinion at pet. app. A-15.

> "Assuming Viriyapanthu was afforded a hearing before the Student Conduct Committee, it is not clear what additional evidence he could have presented in his defense. He references papers he submitted in other courses and professors who would have testified he did not commit plagiarism in preparing those papers. The fact he had not committed plagiarism before is not relevant to whether he committed plagiarism in preparing his paper for Professor Spillenger's course...We cannot think of any additional procedures which would have (or could have) affected the outcome in this case. This simply is not a case in which the presentation and cross-examination of witnesses is necessary for a determination of what occurred or the resolution of factual disputes." Appellate court opinion at pages A-17.

Firstly, it should be noted that the appellate court misstated Petitioner's arguments. In this instance, Petitioner would have presented the testimony of other professors who reviewed the paper for which Mr. Viriyapanthu was punished, and would have testified that they did not believe the method of authorship to be plagiarism. Pursuant to Law School Policies, when one instance of plagiarism is discovered, all of a student's papers are reviewed by the law library and compared to the sources used. The law library marks similar passages, and the paper is submitted to the professor to determine whether the instructor wishes to pursue charges.

In this instance, all of Petitioner's papers for that semester were written with the exact same method of citation as the paper for which he was punished. However, when the cited passages were shown to the professors for the other classes, they did not believe that such a manner of authorship constituted plagiarism. A petition for rehearing was submitted to correct this misstatement, which was denied by the appellate court.

Secondly, this court has made it clear that a claim for deprivation of procedural due process is not dependent on a demonstration of certain success. This Court has made this clear:

> "[T]he right to a hearing does not depend on a demonstration of certain success." Cleveland Board of Education v. Loudermill (1985) 470 U.S. 532 at 544.

> "Even if respondents' suspensions were justified, and even if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process. 'It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing...." Carey v. Piphus (1978) 435 U.S. 247 at 266.

Furthermore, this notion is further bolstered by the fact that, in Goss v. Lopez, and in Carey v. Piphus, it was undisputed that the students *actually committed* the offenses for which they were disciplined. In Goss, the student, "in the presence of the principal, physically attacked a police officer..." Goss v. Lopez 419 U.S. at 570. In Carey, the school principal caught the student with a substance that

was conclusively determined to be marijuana. Carey v. Piphus 435 U.S at 248.

This leads to the lower courts' second misapplication of U.S. Supreme Court precedent, that the purpose of the 'hearing' is not only to determine what factual events actual occurred, but is also to argue the appropriateness of the sanctions. The case directly on point is this court's decision in Cleveland Board of Education v. Loudermill (1985) 470 U.S. 532 involving the termination of a government employee for not indicating on his job application that he had previously been convicted of a felony. It was not in dispute that Mr. Loudermill had not listed the previous conviction on his application. However, the employee had argued that he did not think that his conviction was within the scope of the type of felony conviction inquired as to on the job application. In Loudermill, this court specifically cited Goss, substituting 'employee/employer' for 'student/school' to indicate that the purpose of the hearing is not only to determine 'guilt':

> "The point is that where there is an entitlement, a prior hearing facilitates the consideration of whether a permissible course of action is also an appropriate one....At least the [employer] will be alerted to the existence of disputes about facts and arguments about cause and effect...[His] discretion will be more informed and we think the risk of error substantially reduced.' Goss v. Lopez, 419 U.S. at 483-584.

Although Loudermill involved government employment, a lower district court ruling applied the same reasoning in the context of student discipline. The case on point is Butler v. Oak Creek-Franklin School District (2002 DC Or.) 172 F. Supp.2d 1102 involving the suspension of a high school student for a year for alcohol consumption by a minor. The school district attempted to argue that the student was not entitled to a hearing as he had admitted the charges. The court rejected the argument:

> "[E]ven if plaintiff had confessed to misconduct, he would still be entitled to a hearing. There are two purposes to a disciplinary hearing: To decide whether a rule violation actually occurred; and, if a rule violation actually did occur, to determine the appropriate punishment. Codd, 429 U.S. at 627. Morrisey, 408 U.S. at 479-480. Even if the person being

disciplined admits violating the rule, the appropriate punishment must still be determined. Cleveland Bd. of Educ. V. Loudermill, 470 U.S. at 543. ('Even where the facts are clear, the appropriateness or necessity of the discharge [of a public employee] may not be.') ....In short, absent such special circumstances, even someone who boasts of factual guilt must be given a hearing before a final decision is made on the appropriate punishment." Buttler v. Oak Creek-Franklin School District (2002 DC Or.) 172 F.Supp.2d 1102 at 1114.

The point being made herein is that in order for a hearing to constitute a 'meaningful opportunity to be heard' the individual must be allowed to present evidence and witnesses in his defense. If one cannot present evidence, a 'hearing' is of little use. Furthermore, contrary to the lower courts' decisions, other state and federal courts have held that a student facing long term suspension or expulsion has a due process right to present evidence and witnesses on his own behalf.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION OF DUE PROCESS IN CONNECTION WITH A LONG TERM SUSPENSION OR EXPULSION HAS NEVER BEEN RESOLVED BY THIS COURT RESULTING IN THE GENERATION OF AN INORDINATE AMOUNT OF CASES

A. The Supreme Court Has Never Adjudicated the Issue of Due Process in Long-Term Supsensions or Expulsions

Nearly thirty years ago, this court decided the landmark case of Goss v. Lopez, 419 U.S. 565 (1975), holding that students' interest in continuing their public education was a constitutionally protected interest, and before this interest could be taken away, a student must be afforded some type of hearing. The circumstances of Goss involved the suspension of nine junior high school students for a period of 10 days in connection with a school fight. This Court noted that it stopped "short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own

witnesses to verify his version of the incident." Goss 419 at 583. Instead, this court required only "that there be at least an informal give-and-take between student and disciplinarian" to satisfy Due Process. Goss 419 at 584. However, this court added a proviso that the Goss decision was a limited holding, specifically stating "[w]e should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." Id.

In the thirty years subsequent to *Goss*, this issue not been revisited by this court. Subsequently, the lower state and federal courts have been left on their own devices to determine what was meant by the enigmatic statement that "longer suspensions or expulsions....may require more formal procedures" in the context of more serious deprivations. The Supreme Court's abstention in making a definitive ruling on the issue has resulted in a state of confusion among the lower courts, and the generation of an extremely large amount of cases.

B. There Are an Inordinate Amount of Student Discipline Cases Generated As a Result of the Lack of Guidance by the Supreme Court

As a practical consequence, there are a great number of student discipline lawsuits with a resultant a drain on judicial resources. Student discipline is, by its very nature, a commonplace occurrence. Given the increasing importance of an education in today's society, as well as the increasing associated financial costs with attending a college or university, it should not be surprising that an affected student will seek redress judicially.

The fact that this Court has never articulated what these "more formal procedures" lends itself to generating an inordinate amount of cases, which could be prevented if the Court revisited the issue. Goss involved the suspension of junior high school students for 10 days. As such, it represents the bar minimum, "lower limit" of due process in the context of public education. However, this Court has never addressed the requirements for more serious deprivations, and, as such, there is no defined "upper limit" of what is required. As a result, students are bringing suit for a multitude of perceived due process violations, such as the failure of the school to provide free

legal counsel, or the failure to provide written transcripts of the proceedings.

There has been no precedent from this court defining the "upper limits" of what is required and which probably would prevent the filing of more frivolous suits. As of the writing of this petition, there are approximately **2700** citing references to Goss v. Lopez. A cursory search of state and federal cases utilizing search terms "Goss", "Student", "due process", and derivatives of "expel" or "suspend" will generate results of over **1000** student discipline cases. See printout of case numbers, Petition appendix at page A-32.

II. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER THE 'INFORMAL GIVE AND TAKE SESSION WITH A SCHOOL OFFICIAL' FORMULATED IN GOSS V. LOPEZ IS SUFFICIENT DUE PROCESS IN THE CONTEXT OF LONG TERM SUSPENSIONS OR EXPULSIONS

While it is clear that every court which has examined the issue has followed the Supreme Court's mandate that a long term suspension or expulsion requires *some kind* of hearing, a dispute has arisen among the various state and federal courts obligated to hear these matters as to what exactly this 'hearing' entails. The main point of contention is to whether this hearing is an adjudicative type hearing, with the ability to present evidence and witnesses, or whether the hearing requirement is satisfied by giving the student the opportunity to explain himself before a school official. As it stands now, the issue is so muddled that there is no longer a 'rule of law', and the result of any particular case is dependent upon which jurisdiction the matter is heard in.

A. There Is a State of Confusion in the Lower State and Federal Courts

As shall be further demonstrated *supra*, there is a clear and palpable split amongst the lower courts as to whether the 'hearing' requirement discussed in Goss contemplates an adjudicative type hearing. Some courts have held that an 'adjudicative type' hearing is not required and that an informal meeting with a school official is sufficient, while other courts have required more stringent procedures. While seemingly simple, this is a question that is still in debate among the lower state and federal courts that are obligated to hear these matters. Although this Court may be reluctant to 'expand' the

requirements of Goss, other lower courts *already* have. Several federal circuit courts have invalidated full-dress, adjudicative hearings on such grounds as the school's failure to allow cross-examination of witnesses, the admission of hearsay testimony, or the failure to provide written notification.

In regards to student discipline matters, the only issue with which most legal scholars are in agreement is that there is a disagreement of authority in regards to what process is due in regards to whether a student facing expulsion or long term suspension is entitled to present evidence and witnesses. Every legal article addressing the issue of student discipline, notes the state of confusion in the courts:

> "[T]he cases are inconclusive and in some disarray....The foregoing list of federal authorities is not exhaustive; litigation by pupils against their schools has proliferated and burdened the courts in recent years." John A. v. City Unified School District (1982 Cal. Sup.Ct.) 33 Cal. 3d 301 at 315-316.

> "[T]he lack of a national procedural standard spawned litigation -- as universities were free to call any type of teacher-student meeting a hearing, and students were forced to bring suit to obtain fair procedure.....Yet, without a ruling by the Supreme Court specifying how much process a student was due, the district courts applied *Goss* unevenly." James M. Picozzi, "University Disciplinary Process: What's Fair, What's Due, and What You Don't Get", 96 Yale L.J 2132 at 2134.

> "[B]ecause of the Supreme Court's dictum in Goss that '[l]onger suspensions or expulsions [from school] . . . may require more formal procedures,' lower federal courts are in a state of confusion as to the amount of process a university student is constitutionally required to receive. This confusion has led to a myriad of lawsuits regarding what amount of process and procedure a student facing university discipline must be afforded." Robert B. Groholski, "The Right to Representation by Counsel in University Disciplinary Proceedings: A Denial of Due Process of Law" 19 N. Ill. U. L. Rev. 739 at 772.

"Assuming that a student is entitled to a hearing prior to his expulsion from an institution of learning, a question arises as to what kind of hearing must be given to him. The authorities are not in agreement. A few cases hold that he is entitled to a formal hearing clothed with all the attributes of a judicial hearing. However, the weight of authority is to the effect that no formal hearing is required, that is, that the hearing need not be conducted with all the formalities of a trial in court, even where a statute requires a hearing. Under this view it has been held not necessary that formal (written) charges be preferred, that evidence in support of the charges be introduced at the hearing, that the witnesses be heard under oath, that the student be represented by counsel, that he be confronted with the witnesses against him, that he be permitted the privilege of cross-examination as a matter of right, or that the hearing be governed by the strict rules of evidence." E.H. Schopler, "Right of Student to Hearing on Charges Before Suspension or Expulsion from Educational Institution, 58 A.L.R. 2d 903 at page 17.

"The Supreme Court has done a disservice to both lower courts and higher education in failing to specify, at least in broad strokes, the nature of the interest that qualifies for due process protection. This lapse, as we have seen, has led many courts to assume such an interest and, in the bargain, to decide the constitutional adequacy of the process applied to the student....modification would cleanse the constitutional law in this area of a lingering uncertainty that has caused confusion, needless briefing, argument and judicial decision making, and perhaps even additional federal litigation." Fernand N. Dutile, "Students and Due Process in Higher Education: Of Interests and Procedures" 2 Fl. Coastal L.J. 243 at 288-289.

The state of confusion disserves the interests of students, schools, and the courts. Students and schools are disserved, as neither knows their respective rights or obligations. Similarly, the courts are disserved as they are obligated to hear these cases, providing additional strain on their already full dockets, with the result being a

revisiting of the same issues with different outcomes. The situation could be drastically improved with a single, authoritative rule of law.

A. The Results Would Have Been Different Had This Matter Been Heard in Petitioner's Federal Court

If Mr. Viriyapanthu's matter had been brought in federal court, which is literally across the street from the state court that heard this matter, the result most likely would have been different. The California federal courts and the Ninth Circuit Court of Appeals are one of those federal courts that have held that Goss mandates receive more procedural protection than an "opportunity to present his side of the story" and have required an *adjudicative* type hearing when a student faces a sanction of long term suspension or expulsion.

The case in point is Gonzales v. McEuen (1977 CD Cal.) 435 F. Supp. 460 the court applied *formal rules of evidence* in evaluating the expulsion of high school students for participation in a school riot similar to that in Goss. In Gonzales, the students were given a full hearing before a three member panel of school board officials, with the ability to present evidence. However, because some of the plaintiffs were not allowed to cross-examine the school's witnesses (instead relying on written statements) the federal court held that the students' due process rights were violated. The court noted:

> "The Supreme Court in Goss recognized that longer suspensions or expulsions may require more formal procedures. Goss clearly anticipates that where the student is faced with the severe penalty of expulsion he shall have the right to be represented by and through counsel, to present evidence on his own behalf, and to confront and cross-examine adverse witnesses." Gonzales v. McEuen (1977 CD Cal.) 435 F. Supp. At 467.

Similarly, it should be noted that the 9th Circuit Court of Appeals was one of the earliest circuit courts to hold that a student facing long term suspension or expulsion had a right to an *adjudicative* hearing with the ability to present evidence and witnesses. Two years before the Supreme Court's decision in Goss, the 9th Circuit decided Black Coalition v. Portland School District (1973, CA 9 Or) 484 F.2d 1040, a case involving expulsions of a

number of students for fighting. In this decision the 9th Circuit Court of Appeal noted:

> "The district court held that the expulsion procedures were unconstitutional for failing to provide a hearing at which the student could be represented by counsel and, through counsel, present witnesses on his own behalf, and cross-examine adverse witnesses. Other courts have held that a hearing incorporating these safeguards must be held before or shortly after a child is expelled or suspended for a prolonged or indefinite period. Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967). *See also* Goldberg v. Kelly, *supra*, and its companion, Wheeler v. Montgomery, 397 U.S. 280, 25 L. Ed. 2d 307, 90 S. Ct. 1026 (1970). *See, generally*, C. Wright, The Constitution on the Campus, 22 VAND. L. REV. 1027 (1969); W. Seavey, Dismissal of Students: "Due Process," 70 HARV. L. REV. 1406 (1957). We agree and therefore affirm the district court's holding that the expulsion procedures followed by defendant school board were unconstitutional." Black Coalition v. Portland School District (1973, CA 9 Or) 484 F.2d 1040 at 1045.

B. The Texas Supreme Court and Other State Courts Have Come to Different Results as the California Courts

In addition to the Ninth Circuit, other state courts would have also come to a different result from the courts in this case. One of the most notable is the Texas Supreme Court's decision in University of Tex. Medical Sch. V. Than (1995 Tx. Sup.Ct.) 901 S.W.2d 926, where the court specifically held that the 'hearing' mandated in Goss is an adjudicative type hearing. The Than decision involved a similar allegation of dishonesty which could preclude future opportunities. In Than the court specifically noted that:

> "[a] medical student charged with academic dishonesty faces not only serious damage to his reputation but also the loss of his chosen profession as a physician. [Citations omitted.] The stigma is likely to follow the student and preclude him from completing his education at other institutions." University of Tex. Medical Sch. v. Than 901 S.W.2d at 930.

Because of the nature of the deprivation the Texas Supreme Court "conclud[ed] that due process requires some level of process beyond the informal hearing of *Goss*" (Id. at 931) and invalidated the expulsion, after a full adjudicative hearing before a panel of university officials because the plaintiff had been excluded from a portion of the proceeding. The Texas Supreme Court noted:

> "[W]e note that UT, pursuant to its own rules and regulations, afforded Than a high level of due process. Than was given oral and written notice of the charges against him; was given written notice of evidence to be used against him the hearing, including a witness list and summaries of their testimony; was afforded the right to counsel or other representation; and was afforded a formal hearing with the opportunity to present evidence and cross-examine witnesses. Despite this level of process, we conclude that Than's due course of law rights were violated by his exclusion from a portion of the evidentiary proceedings." University of Tex. Medical Sch. v. Than 901 S.W.2d at 931.

Similarly, other state courts have held that due process requires more than an informal give and take with a school official. In Expulsion of E.J.W. from Independent School Dist. No. 500 (Minn. Ct. App. 2001) 632 N.W.2d 775 the court found that the refusal of the school district to provide the name of a student's accuser, and to allow his accuser's cross-examination by his attorney was a violation of due process:

> "If the district was not going to call the students as witnesses, E.J.W. was entitled to have their names *before* the hearing, so his attorney would have an opportunity to investigate and compel their presence by subpoena if that was deemed necessary to present an adequate defense....The commissioner of the DCFL properly determined that the district deprived E.J.W. of his due-process rights by failing to call or identify the student witnesses to testify at the hearing. Expulsion of E.J.W. from Independent School Dist. No. 500 (Minn. Ct. App. 2001) 632 N.W.2d 775 at 781-782.

In J.S. v. Bethlehem Area School Dist. (Pa. Commw. Ct. 2002) 794 A.2d 936, due process was satisfied by adjudicative hearing with the

ability to present witnesses and cross-examine accusers. In Stone v. Prosser Consol. School Dist. No. 116 (Div. 3 1999) 94 Wash. App. 73 the court applied more formal rules of evidence and invalidated the expulsion of a high school student based on the admission of hearsay evidence:

> "[I]t is risky to base an expulsion on hearsay statements bolstered by a school official's testimony that the proponent is reliable. As stated in Colquitt, a case with remarkably similar facts, reliance on the official's opinion of the absent witnesses' credibility 'is a particularly egregious departure from the adversarial standard.'"Stone v. Prosser Consol. School Dist. No. 116 (Div. 3 1999) 94 Wash. App. 73 at 78.

C. Other Federal Circuit Courts Have Held that Due Process in Connection with a Long Term Suspension or Expulsion is Not Satisfied by an "Opportunity for a Student to Present His Side of The Story" and Have Required an Adjudicative Type Hearing with the Ability to Present Evidence and Witnesses

In addition to the Ninth Circuit, other federal circuit courts and state courts have interpreted Goss to require an adjudicative type hearing, with the ability to present evidence, witnesses, cross-examine accusers, with some holding that a student is entitled to legal representation by an attorney. Specifically, the Sixth, Seventh, and Eighth, have come to similar conclusions as the Ninth Circuit. The list of cases involving student discipline is extremely large and even a cursory examination of a large number of them would be beyond the limitations of this petition. The cases discussed *supra* are not exhaustive, but are set forth to demonstrate petitioner's argument.

One of the most notable cases comes from the Seventh Circuit. Carey v. Piphus (1976) 545 F.2d 30 (overruled on other grounds by Carey v. Piphus (1978) 435 U.S. 247) Carey is of note as it involved similar factual circumstances as the case herein; specifically in Carey the student's sole due process consisted of two meetings with the principal. Carey was decided one year after Goss, and in that case the Seventh Circuit held that a student facing suspension beyond 10 days is entitled to more formal procedures than a 'give and take' session with school officials and is specifically entitled to an *adjudicative type hearing*.

Carey v. Piphus involved the suspension of high school student Jarius Piphus for 20 days after the school principal caught him with a substance that was later conclusively determined to be marijuana. The 'due process' prior to the suspension consisted of "two meetings...among Piphus, his mother, his sister, school officials, and representatives from a legal aid clinic." Carey v. Piphus 435 U.S at 249. The court found this was insufficient due process and held that school officials were "not entitled to qualified immunity from under the second branch of Wood v. Strickland, 420 U.S. 308 (1975), because they 'should have known that a lengthy suspension without any *adjudicative* hearing of any type' would violate procedural due process." [Emphasis added.] Carey v. Piphus 435 U.S. at 251.

In the intervening years, the Seventh Circuit has not changed its requirement that a long-term suspension or expulsion requires an adjudicative hearing. See Remer v. Burlington Area School District (2002 7th Cir.) 286 F.3d 1007; Lamb v. Panhandle Community Unit School Dist (1987, CA7 Ill.) 826 F.2d 526.

The Sixth Circuit Court of Appeals has also required more procedural due process than an 'informal give and take' between student and disciplinarian. The Sixth Circuit also requires that an adjudicative type hearing, and has required that such hearings be conducted according to more formalized rules of evidence. In Newsome v. Batavia Local School Dist. (1988 6th Cir.) 842 F.2d 920, a high school student had been expelled for marijuana possession. In Newsome, the court held that due process had been violated by the testimony of a counselor before a closed session of the school board from which the student was excluded. The Newsome Court noted:

> "The superintendent failed to comply with this minimum procedural safeguard required by *Goss* during the school board hearing. Rather than disclosing to Newsome during the open hearing before the school board that Jean Wessler, a counselor with the Clermont County Council on Alcoholism, had informed him that Newsome had confessed to her his involvement in the marijuana incident so that Newsome would have an opportunity to rebut this item of evidence, the superintendent waited until the closed deliberation session to apprise the school board of this information. Such a tactic completely deprived Newsome of any opportunity to rebut the evidence and amounted to a clear deprivation of his right to

procedural due process of law." Newsome v. Batavia Local School Dist. (1988) 842 F.2d 920 at 927-928.

In 1979, the Eighth Circuit Court of Appeals also came to the same conclusion as the Sixth, Seventh, and Ninth Circuit and held that a student who faces expulsion has a due process right to an adjudicative hearing, with the specific right to cross-examine a student's accusers. In Dillon v. Pulaski County Special School Dist. (1979 8th Cir.) 594 F.2d 699. Dillon involved the expulsion of a student for kissing another student on school grounds. The 8th Circuit Court of Appeals held that the student "was denied procedural due process of law by the refusal of school officials to allow him to call the accusing teacher as a witness during his expulsion hearing." Dillon v. Pulaski County Special School Dist. 594 F.2d at 700.

The 8th Circuit also came to a similar result in 1999 in London v. Directors of De Witte Public Schools (1999) 194 F.3d 873, (student provided "a hearing where he was represented by counsel who had full opportunity to examine and cross-examine witnesses" at 877.) As well in Corso v. Creighton University (1984, CA8 Neb) 731 F2d 529 (invalidating the expulsion of a medical student for cheating on an examination due to the school's failure to provide an adjudicative type hearing).

In addition, there is a large number of the lower federal district courts have also held that due process in connection with long-term suspensions or expulsions requires more formality than an 'informal give and take session' with a school official. As follows is a listing of cases in which either an adjudicative type hearing (with the ability to present evidence and witnesses) was held, or the examining court found a violation of a student's constitutional rights:

In Killion v. Franklin Regional School Dist., (W.D. Pa. 2001) 136 F. Supp. 2d 446, due process was held to have been violated by the school's failure to provide written notification prior to the hearing In Bundick v. Bay City Independent Sch. Dist (S.D. Tex. 2001) 140 F. Supp.2d 745 student afforded representation by counsel with ability to cross-examine witnesses; In Draper v. Columbus Public Schools (1991, SD Ohio) 760 F. Supp. 131 the student was represented by counsel and allowed to present evidence and witnesses before full school board hearing; In Ross v. Disare (1977, SD NY) 500 F. Supp 928 the introduction of written statements without prior notice was

held to be a due process violation as it deprived students of due process as they could not adequately formulate a defense to disciplinary charges; In Rhyne v. Childs (1973, ND Fla) 359 F. Supp. 1085 the students were given right to confront and cross-examine accusers; In Vought v. Van Buren Public Schools (1969, ED Mich) 306 F. Supp 1388 student denied due process by schools failure to provide adjudicative hearing as to whether he possessed pornography on school grounds; In Hobson v. Bailey (1970, WD Tenn) 309 F. Supp. 1393 due process was held violated when student was denied opportunity to present witnesses; In Graham v. Knutzen (1972, DC Neb) 351 F. Supp. 642 the inability of students to confront and cross examine accusers was a violation of due process; In Hagopian v. Knowlton (1972, CA 2NY) 470 F.2d 201 Military cadet had due process right to present evidence and witnesses; In Gardenhire v. Chalmers (1971, DC Kan) 326 F. Supp. 1207 the suspension of university student was invalidated due to student's inability to cross-examine witnesses was a violation of due process.

The foregoing list of cases is not exhaustive. The number of student discipline cases, which have been published, numbers around a thousand. Even a cursory summary of these cases would be beyond the scope of the page limitations of this writ. Rather, Petitioner cites these cases to illustrate the point that a large number of lower courts, taking a cue from the Goss v. Lopez decision, have held that due process requires an adjudicative type hearing with at least the ability to present evidence and witnesses.

D. Courts Which Have Held That Due Process Does Not Require An Adjudicative Hearing and Only Affords A Student the Opportunity to Present His Side of The Story Even When Sanctions Are Long-Term Suspension or Expulsion.

Other federal Circuit courts and federal district courts have flatly rejected the proposition that the Supreme Court meant to mandate an adjudicative type hearing even when the proposed sanction was long-term suspension or expulsion. Even in more severe, deprivations these courts have held that all that is required is that a student be given an opportunity to present his version of events to school officials. In such cases, it has been held, *inter alia*, that a school need not provide written charges to a student, the student has

no right to present witnesses, or examine the student's accuser. The Federal Circuit Courtswhich have so held include the First, Fifth, and Tenth Circuit.

The First Circuit Court of Appeal specifically rejects the proposition of 7th, 8th, and 9th Circuits that an adjudicative hearing is required. In Gorman v. University of Rhode Island (1st Cir. 1988) 837 F.2d 7, a case involving the suspension of a university student, the 1st Circuit Court of Appeals has held that the hearing articulated in Goss does not need to be adjudicative in nature, but need only provide a student an opportunity to 'explain' his version of events:

> "[T]he Due Process Clause requires, not an 'elaborate hearing' before a neutral party, but simply 'an informal give-and-take between student and disciplinarian' which gives the student 'an opportunity to explain his version of the facts.'" *See Ingraham v. Wright*, 430 U.S. 651, 693, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977) (White, J., dissenting). Gorman v. University of Rhode Island (1st Cir. 1988) 837 F.2d 7 at 27.

In addition, the 1st Circuit also rejected plaintiff's claims that he was entitled to cross-examine witnesses:

> "The district court rejected Gorman's contention that he was deprived of his constitutional right to retain counsel, and to cross-examine his accusers on his allegations of bias. On these two allegations of error, we agree with the holding of the district court." Gorman v. University of Rhode Island (1st Cir. 1988) 837 F.2d 7 at 25-26.

The Tenth Circuit has also rejected the proposition of a more formalized hearing in long-term suspensions or expulsions in Watson v. Beckel (2001 10th Cir.) 242 F.3d 1237, involving the expulsion from a state military school of a cadet for a racially motivated attack on his roommate. The Tenth Circuit found that a student was only entitled to an 'opportunity to be heard' instead of more formalized procedures advocated by other circuits. The decision is further of note as the court ruled that a student need not be allowed to present evidence or witnesses during this 'hearing':

> "Mr. Watson requests that the court order "that upon the proposed expulsion or long-term suspension of any student attending a state-supported educational institution," the

> student must be afforded written notice specifying the charges, legal counsel, the presentation of evidence, the right to cross-examine witnesses, an impartial board, a transcript of the hearing, and independent review of the decision....precedent indicate[s] that due process does not require all of these rights" Watson v. Beckel (2001 10th Cir.) 242 F.3d 1237 at 1242-1243.

Similarly, the 2d Circuit Court of Appeals also has held that the 'hearing' need not be adjudicative in nature, with the ability to present or cross examine witnesses. Winnick v. Manning (2d Cir. 1972) 460 F.2d 545 (Student not entitled to hearing to present evidence or witnesses at hearing at 549).

Other lower courts have also held that Goss requires only an informal opportunity to explain himself, even for more serious allegations. One of the most notable is Gamble v. Ware County Bd. of Education (2002) 253 Ga. App. 819, based on the seriousness of the charges against the student. In Gamble, the court found that a student accused of sexual misconduct (who was suspended and of which a report of sexual misconduct was placed in his permanent record) was not entitled to present evidence, witnesses or confront or cross examine his accusers:

> "Under *Goss*, however, due process guarantees a suspended student only oral or written notice of the charges, an explanation of the evidence against him, and an opportunity to present his side of the story. A school is not required to "afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident." Clearly, the school need not formally gather, preserve, and present evidence. Gamble at 842.

Similarly in Jaska v. Regents of the University of Michigan (1984) 597 F. Supp. a student accused of cheating on a test complained that he had been deprived of his right to cross-examine the professor who had accused him. In contradiction to the holdings of the 9th, 8th, and 7th Circuits, the district court held that a student has no 'right' to confront the accusing professor:

"Plaintiff, moreover, again misconstrues the nature of a school disciplinary proceeding. The Constitution does not confer on plaintiff the right to cross-examine his accuser in a school disciplinary proceeding.....*Dixon v. Alabama State Board of Education*, 294 F.2d at 159 (Due process does not require "a full-dress judicial hearing, with the right to cross-examine witnesses. . . .")." Jaska v. Regents of the University of Michigan (1984) 597 F. Supp. 1245 at 1252-1253.

E. Because of Its Unique Circumstances, This Case Is Particularly Suitable for Review

Petitioner respectfully submits that the unique qualities of this case make it particularly suitable for review for the foregoing reasons:

The first reason is that the fact that this case represents the highest possible level of due process protection and would provide an 'upper limit' to student due process rights. Indeed, petitioner cannot conceive of any other possible circumstances where a student would be entitled to any higher level of due process than a law student dismissed on a charge constituting a finding of moral turpitude. A review of this case would likely curtail the amount of new cases filed, as it would represent the maximum protection available so that 'less meritorious' cases are not filed.

In Goss, this court set forth the bare minimum requirements for students suspended for 10 days for fighting. However, the court's admonition that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures" has 'left the door open' for an inordinate amount of litigation as no upper boundaries were defined. The end result is that there are now one thousand published student discipline cases and the courts have become flooded with lawsuits from students seeking a full panoply of rights equal to that of criminal defendants.

By adjudicating this case, and defining what rights are (or are not) available under the highest due process available, hopefully many of these cases will not be filed. Similarly, this case, coupled with the base level due process defined in Goss, would provide a full spectrum of guidance to the lower courts.

Secondly, this case is suitable for review as it is a pure matter of law. The main issue are clearly defined as they are codified in the

UCLA Student Conduct Code itself. The case was very well documented in the lower courts, and there are few factual disputes.

Finally, Petitioner contends that this case represents a good vehicle for review, because he is not asking that much by way of procedural protection. This is not a case where Petitioner is asking for the full menu of rights afforded to a criminal defendant, such as transcripts of the proceeding, the adherence to strict rules of evidence, representation by counsel, etc. Here, all Petitioner was asking for was the ability to present evidence (papers written in the same manner and doctrinal authority) which led him to believe that his method of citation was acceptable, and witnesses (other university professors) who would have testified that they did not believe his work constituted plagiarism. That is all.

Furthermore, this is not an unreasonable request as this Court has held that such hearings in other matters of moderate importance, such as the termination of government employment (Gilbert v. Homar (1997) 520 U.S. 924; Cleveland Bd. of Ed. v. Loudermill (1985) 470 U.S. 532), the revocation of a state driver's license (Bell v. Burson (1971) 402 U.S. 535), the termination of welfare benefits (Goldberg v. Kelly (1970) 397 U.S. 254), and even convicted felons faced with revocation of 'good time' credits (Ponte v. Real (1985) 471 U.S. 491). It would be a strange set of circumstances if a convicted felon is entitled to more procedural protection than a public school student.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Paul Viriyapanthu,
Petitioner In Pro Per
12072 Henry Evans Drive
Garden Grove, CA 92840
(714) 537-1259

March 8, 2003

TRIAL COURT JUDGMENT
SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES, DEPT. 86
Presiding Judge: Hon. David Yaffe
Date of Judgment: January 22, 2002
Viriyapanthu v. Regents of the University of California, Case No. BS071888

PETITIONER, PAUL VIRIYAPANTHU'S NOTICE OF MOTION FOR JUDGMENT ON ADMINISTRATIVE WRIT OF MANDATE:

Matter comes on for trial and is argued.

The Petition for Writ of Mandate is denied.

All declarations and exhibits filed in this action are admitted in evidence.

Petitioner challenges an administrative decision suspending him for one semester from the UCLA School of Law and requiring that he perform 300 hours of community service as a condition of readmission after the period of suspension.

The decision is subject to judicial review is dated March 6, 2000, and is made by the vice chancellor for student affairs. It is based upon the finding that petitioner plagiarized published material by submitting a term paper during the fall semester of 1998, numerous portions of which were taken directly from other sources without attribution. The vice-chancellor specifically finds that petitioner's behavior constitutes plagiarism, rather than mere sloppiness or carelessness.

Petitioner is unclear as to the theory upon which he **[page 2]** requests relief. He acknowledges that his claim is based only upon the denial of an evidentiary hearing, his right to which presents purely an issue of law, but he nevertheless contends that the court must exercise its independent judgment as to the weight of the evidence in the

administrative record, a standard that applies only when an evidentiary hearing has been held. (Opening Brief 13:13-20).

To the extent that the petition request the court to make a factual determination, the court finds, based upon its independent examination of the documents presented to it by parties as exhibits, that the weight of the evidence contained therein supports the administrative decision. A comparison of petitioner's term paper (Exhibit B to Cheadle Declaration) with a paper by Charles J. McClain published by the University of California Press in 1994 (Exhibit C to the Cheadle Declaration), shows that large protions of petitioner's paper were taken directly from the McClain paper without attribution, and that petitioner's contention that he did not intend to do so is not worthy of belief.

Petitioner's main contention appears to be that he was entitled to, but denied, a full evidentiary hearing at the administrative level, "including evidence, witnesses, and mitigating factors." (Reply Brief 9:21-23). This contention presents a pure question of law to be decided under due process principles, the issue being what process is due. None **[page 3]** of the authorities cited by petitioner holds, or even implies, than an educational institution must hold a judicial-type hearing, with witnesses, objections and ruling thereon, and the application of the rules of evidence, before deciding whether to discipline a student for the violation of academic standards, as opposed to non-academic conduct.

It is unclear whether the academic discipline imposed upon petitioner affected any "liberty interest" that is entitled to constitutional protection because it is unclear that any information regarding such discipline is available to the public, except to the extent that it is made so by petitioner. To the extent that any such liberty interest is affected, however, petitioner was granted all of the process that was due to him. He was given notice of the charges against him and an opportunity to tell his side of the story. Nothing more is required.

Petitioner also seems to complain that he was denied a "fair trial" because he was "promised" an evidentiary hearing, but was never given one. The contention has no merit because petitioner fails to

prove that any such promise was made, and because petitioner fails to show what evidence he could have presented, that might have saved him from the punishment that was imposed upon him.

Counsel for respondent is to submit a proposed judgment to this department within 10 days together **[page 4]** with a proof of service showing that a copy thereof has been served upon opposing counsel by hand delivery or FAX. The court will hold it for 10 days before signing and filing it.

APPELLATE JUDGMENT
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN
Judges: Hon. Johnson, J., Hon Perluss, P.J., and Woods, J.
Date of Judgment: September 15, 2003
PAUL VIRIYAPANTHU v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Case No.: B157836 (Super. Ct. No. BS071888)

APPEAL from a judgment of the Superior Court of Los Angeles County. David Yaffe, Judge. Affirmed

Paul Viriyapanthu, in pro. per., for Plaintiff and Appellant.

James E. Holst, John F. Lundberg and Cynthia A Vroom for Defendant and Respondent. **[page 2]**

Paul Viriyapanthu brought this action against The Regents of the University of California (the University), seeking a peremptory writ of mandate directing the University to set aside its decision suspending him from the University of California, Los Angeles (UCLA) Law School on a plagiarism charge. Viriyapanthu alleges the University violated his right to procedural due process by failing to afford him proper notice and a hearing before it suspended. The trial court denied the petition, concluding the University complied with due process requirements by giving Viriyapanthu notice of the charge against him and an opportunity to present his side of the story. We affirm.

FACTS AND PROCEEDINGS BELOW

Paul Viriyapanthu is a graduate of UCLA Law School. During his law school career, the University suspended him for one semester on a finding he committed plagiarism.

In the Fall semester of his second year of law school, Viriyapanthu was enrolled in a legal history seminar taught by Professor Clyde Spillenger. At the end of the semester, Viriyapanthu submitted a 49-page research paper in the course. After reviewing the paper, Professor Spillenger told Elizabeth Cheadle, the Assistant Dean of the Law School, "substantial portions of the paper had been

copied from outside sources without acknowledgment." According to Professor Spillenger, the "principal source" of the copied material was a book written by Charles McClain. Professor Spillenger gave Dean Cheadle a copy of the research paper and excepts from the McClain book.

Dean Cheadle reviewed Viriyapanthu's paper and compared it with the excerpts from the McClain book.[1] Like Professor Spillenger, she concluded "a substantial portion of the paper had been copied from [the] McClain [book] without acknowledgement." **[page 3]** Cheadle asked one of the law school's librarians to review the paper and the sources cited. According to Cheadle, the librarian confirmed the "principal source" of the copied material was the McClain book, but she also identified other material in the paper which was copied from other sources without attribution.

Sometime during the following (Spring) semester, Dean Cheadle contacted Viriyapanthu and asked him to set up a meeting with her. According to Viriyapanthu, Dean Cheadle did not inform him about the purpose of the meeting.

In or about April 1999, Viriyapanthu reported to Dean Cheadle's office for the scheduled meeting. Professor Spillenger was there when he arrived. Dean Cheadle and Professor Spillenger told Viriyapanthu they believed he had committed plagiarism. Professor Spillenger pointed to portions of "the paper where sources had been copied verbatim or slightly paraphrased without attribution." According to Dean Cheadle, Viriyapanthu explained "his research practice was to take notes into his laptop, then cut and paste passages in writing the paper. He told [them] that although his work may have been sloppy, he did not believe it constituted plagiarism. He also said that he had been under time pressure to complete his written work for the semester, particularly his paper for Professor Spillenger, and did not have enough time to 'clean up' his work." According to Viriyapanthu, he informed them he "had made it a specific point to footnote to the authors that [he] used." Viryapanthu requested the meeting be adjourned so he could review his paper, which he had submitted about four months before. Dean Cheadle agreed to give him additional time to respond to the inquiry.

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[1] According to Viriyapanthu, Dean Cheadle told him at their second meeting (described below) she had not "read his paper".

About a week or so later, Viriyapanthu met again with Dean Cheadle and Professor Spillenger. According to Dean Cheadle, "Viriyapanthu admitted that his work was 'fast and loose,' but denied that he had committed plagiarism, saying he had not intended to deceive; he had simply been under time pressure to complete his work for the semester and had been careless." According to Dean Cheadle, "Viriyapanthu admitted that his work was 'fast and loose,' but denied that he had committed plagiarism, saying he had not intended to deceive; he had simply been under time pressure to complete his work for the semester and had been careless." Dean Cheadle and Professor Spillenger told him he had committed plagiarism regardless of whether he had intended to deceive because he had copied or paraphrased numerous passages without attribution. Viriyapanthu noted he had not "used authors not included/referenced to [*sic*] in the text." **[page 4]**

Viriyapanthu requested Dean Cheadle have some other people at the law school review his paper. She agreed even though "[t]here is no provision in [UCLA's] rules and regulations for such a request." According to Dean Cheadle, Viriyapanthu named three people he wanted to review his paper. Viriyapanthu claims he gave Dean Cheadle the names of six professors. In any event, Dean Cheadle contacted Tom Holm, an instructor of the first year lawyering skills class, and Terrence Mann, the president of the Student Bar Association. Both agreed to review the paper. Apparently, Viriyapanthu separately contacted Mann and told him "he had been unfairly accused of plagiarizing a paper...." Viriyapanthu asked Mann to review the paper and meet with law school administrators on his behalf. Mann, who was "concerned that a fellow student had been the victim of a mistaken accusation of plagiarism," complied with these requests.

Dean Cheadle gave Holm a copy of Viriyapanthu's paper (with his name removed) and excerpts from the McClain book. Holm determined: "The paper included some citations to the book, but consistently to the wrong page. However, other passages in the paper had been copied verbatim from the book without any citation at all." Holm concluded: "[T]his was not merely careless citation but the use of significant amounts of someone else's work with no attribution at all. This appeared to me to be a clear form of plagiarism." Holm reported his findings an conclusions to Dean Cheadle. Only then did

Dean Cheadle reveal the student's identity. Holm did not recognize Viriyapanthu's name.

Viriyapanthu game Mann a copy of his paper, which Mann reviewed. In June 1999, Mann met with Dean Cheadle. During the meeting, Dean Cheadle showed Mann the sources she believed Viriyapanthu had copied without attribution. Mann described his investigation and conclusion as follows: "I looked at designated passages from two of these books, and compared them to Mr. Viriyapanthu's paper. It was immediately obvious to me that those passages had been copied in Mr. Viriyapanthu's paper, either verbatim or with minor paraphrasing, without attribution. The amount of copying was quite substantial. I told Dean Cheadle that this appeared to be a clear case of plagiarism." **[page 5]**

Dean Cheadle discussed this matter with Jonathan Varat, the Dean of UCLA Law School. Dean Varat requested she refer the matter for disciplinary action to Cary Porter, UCLA's Senior Associate Dean of Students. On September 13, 1999, Dean Cheadle sent a letter to Dean Porter, summarizing the investigation. She attached a copy of the paper and excerpts of "a few of the sources quoted or paraphrased without adequate attribution," including the McClain book.

On September 24, 1999, Dean Cheadle sent an e-mail message to Viriyapanthu, informing him Holm and Mann had agreed this was a case of plagairsim. She also told him she had referred the matter to Dean Porter. She explained: "You should expect to hear from Dean Porter very soon; he will ask you to schedule a meeting and will explain the university's process in these matters to you."

On November 21, 1999, Dean Porter sent a letter to Viriyapanthu, setting forth the charge of plagiarism against him and informing him, "If this allegation is substantiated such conduct constitutes a violation of Section 102.01 of the UCLA Student Conduct Code."[2] Dean Porter enclosed a copy of the Student

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[2] Under this section of the Student Conduct Code, "Plagiarism includes, but is not limited to, the use of another's words or ideas as if they were one's own; including, but not limited to representing, either with the intent to deceive or by the omission of the true source, part of or an entire work produced by someone other than the student, obtained by purchase or otherwise, as the student's original work; or, representing the identifiable but altered ideas, data or writing of another person as if those ideas, data or writing were the student's original work."

Conduct Code for Viriyapanthu's reference. Dean Porter asked Viriyapanthu to schedule a meeting with him by November 29.

On November 29, 1999, Viriyapanthu sent an e-mail message to Dean Porter requesting the meeting be set in early to mid-January due to his final examinations schedule and his plans for the winter break. He informed Dean Porter he planned to retain counsel, stating, "As I understand it I am entitled to bring my own legal representative at the hearing, and at this meeting with you the formal rules of the proceeding will be discussed, I thought it best to bring counsel with me so he could ask **[page 6]** any questions about the procedures directly to you instead of hearing them second hand from me. [*Sic.*] Viriyapanthu claims he believed the meeting with Dean Porter would be an "initial meeting[,]...informal in nature, in order to explain university procedures to [him], and for [him] to explain any relevant information as a precursor to [a] hearing before the Student Conduct Committee." Dean Porter agreed to postpone the meeting.

On January 10, 2000, Dean Porter assigned this matter to Kathleen McMahon, UCLA's Associate Dean of Students. Dean McMahon reviewed Dean Cheadle's September 13, 1999 letter to Dean Porter, Viriyapanthu's paper, and relevant excerpts from the McClain book. She scheduled a meeting with Viriyapanthu for January 27.

About a week before the meeting, Viriyapanthu sent an e-mailo message to Dean Cheadle, requesting copies of two papers and a take-home examination he had submitted in other courses. Apparently Dean Cdheadle had asked the librarian to review at least two of these documents for evidence of plagiarism. Dean Cheadle informed him she no longer had the copies the librarian had reviewed because she had returned them to the appropriate professors.[3]

Viriyapanthu and his attorney met with Dean McMahon on January 27. She "reviewed the allegation of plagiarism" with them and "invited Mr. Viriyapanthu to present his explanation of the events." According to Dean McMahon, Viriyapanthu "admitted that his paper for Professor Spillenger had included passages taken nearly verbatim from another source without acknowledging that source. He told [her] that he was under pressure to complete a number of papers for his law school courses, and that he had run out of time and failed

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[3] Viriyapanthu's claim the University "withheld" this "exculpatory evidence" is without merit.

to properly check his work. [He] told [her] that he had made an error in judgment, that he should never have submitted the paper as written and that he was taking full responsibility for his actions." Viriyapanthu also "stated that he had not intended to plagiarize by his conduct. He said that he was rusty on the rules for **[page 7]** papers and that his work had been hasty and sloppy." Dean McMahon explained intent is not a necessary element of plagiarism under the Student Conduct Code.

Under section III, paragraph (A) (6) (d) of the Student Conduct Code, if a student admits culpability and "the Dean concludes that there is sufficient evidence to sustain a finding of culpability," the Dean may impose a sanction. If the student does not admit culpability, but the Dean finds there is sufficient evidence the student violated a school regulation, "the Dean shall refer the case to the Student Conduct Committee for a hearing." Viriyapanthu claims he asked Dean McMahon to refer the case to the Student Conduct Committee for such a hearing. She does not recall him making such a request. She informed him, "[b]ased on [his] admission that he had submitted a paper containing passages from another source without acknowledging that source, constituting plagiarism under the Student Conduct Code,…an appropriate sanction would need to be imposed."

Dean McMahon recalls she "thanked Mr. Viriyapanthu for taking responsibility for his actions and told him that [she] would give careful consideration to the appropriate sanction to be imposed, confer with the Law School and meet with him to discuss the sanctionin person." She also "invited him to submit a statement to [her] for his file" and "to write a letter of apology to Professor Spillenger." Viriyapanthu claims Dean McMahon "ordered" him to write the statement and the letter of apology, and he only did so "under coercion and duress."

In his statement to Dean McMahon, Viriyapanthu wrote, in pertinent part: "Upon the benefit of further reflection and a year of hindsight I realize that the selected material simply should not have been included or should have been appropriately cited. It was unequivocally an error in judgment on my part. However, I hope that you can understand that it was not a deliberate attempt at dishonesty, nor was my intent to 'cheat' my way through the assignment. The way I wrote the paper was to type in on my computer relevant material from both primary and secondary source material and piece it together from there and make notations in parenthesis at the end of a section to

know where I got it from. As I explained when we met in your office, I was lax in noting the actual quotations I input [*sic*] from the original sources. [PP] Please understand that this **[page 8]** was not a situation where I just ran out of time and thought I could plagiarize my way out of it. Because I had researched the McClain material at the beginning of the semester, I did not remember the extent to which I had imported entire paragraphs from the McClain work. I had augmented McClain's work with actual primary source materials and, with poor notation, it all got mixed together. All I had time to do was sort of slap the entire paper and turn it in. I thought that since it was background historical fact, if I tacked on cites to McClain I would not be in danger of plagiarism. Now I realize this is wrong. In hindsight, I realize that I made an extremely poor decision, and should have properly reviewed and corrected the paper." Viriyapanthu also admitted his wrongdoing in his letter of apology to Professor Spillenger.[4]

Dean McMahon spoke with Dean Cheadle about an appropriate sanction for Viriyapanthu's conduct. After conferring with Dean Varat and Professor Spillenger, Dean Cheadle told Dean McMahon the "Law School believed that an appropriate sanction would be suspended dismissal, a retroactive suspension for the semester in which Mr. Viriyapanthu had submitted the plagiarized paper (Fall 1998), and community service." Based on her investigation and review of the relevant documents, Dean McMahon agreed a retroactive suspension for Fall semester 1998 and 300 hours of community service was the appropriate sanction. On February 8, 2000, Dean McMahon met with Viriyapanthu and his attorney and discussed the sanction to be imposed. On February 11, 2000, Dean McMahon sent a letter to Viriyapanthu setting forth the terms of the sanction.

Pursuant to section III, paragraph (A)(9) of the Student Conduct Code, Viriyapanthu appealed the sanction to the Vice Chancellor of Student Affairs, Winston Doby. In his appeal letter, Viriyapanthu explained, although he did not "feel that there were any improprieties in the decision making process," he believed the

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[4] Given the fact Viriyapanthu already had accepted responsibility for his conduct in his meetings with Dean Cheadle, Professor Spillenger and Dean McMahon, his assertion he wrote the statement and letter of apology "under coercion and duress," even if true would have no bearing on our decision in this matter.

sanction **[page 9]** imposed was "excessively punitive." He stated: "I have never denied that the paper simply should not have been turned in as it was. Furthermore, I readily admit that doing so demonstrated a serious error in judgment, and is deserving of consequences. However, I feel that taking away all the credits for the other classes I took for that semester, all of which were thoroughly examined with no allegation of improper conduct, is excessive relative to the harm of my actions." Viriyapanthu requested a meeting with Doby.

Vice Chancellor Doby discussed the matter with Dean McMahon and reviewed the disciplinary file. He concluded the plagiarism finding was proper and the sanction was appropriate. He considered the mitigating circumstances and alleged lack of intent, but noted "the amount of copying found in [the] paper was substantial . . . [and] Viriyapanthu freely admitted his responsibility." In light of Viriyapanthu's several written statements explaining his conduct, Doby did not feel it was necessary to meet with Viriyapanthu before reaching his decision. On March 6, 2000, Dolby sent a letter to Viriyapanthu, upholding the sanction.

Viriyapanthu fulfilled the terms of the sanction and graduated from UCLA Law School in December 2000.[5] In September 2001, he filed the present action against the University, seeking a peremptory writ of mandate directing the University to set aside its decision suspending him. He alleges the University violated his right to procedural due process by failing to afford him a hearing before it suspended him. The University opposed the petition, arguing Viriyapanthu received notice of the charge and an opportunity to be heard, and was entitled to no more.

The trial court denied the petition and entered judgment in favor of the University. The court found, "based upon its independent examination of the documents presented to it by the parties as exhibits, . . . that large portions of [Viriyapanthu]'s paper were taken directly from the McClain paper without attribution, and that [Viriyapanthu]'s contention **[page 10]** that he did not intend to do so is not worthy of belief." The court also concluded Viriyapanthu "was granted all of the process that was due him. He was given notice of the charges against him and an opportunity to tell his side of the story.

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[5] He has informed this court he has since been admitted as a member of the California State Bar.

Nothing more is required."

DISCUSSION

Viriyapanthu contends the meeting with Dean McMahon does not constitute the type of "hearing" to which he was entitled under the due process clause of the Fourteenth Amendment. He argues the University violated his right to procedural due process by not allowing him to have a hearing before the Student Conduct Committee with an opportunity to present evidence and examine and cross-examine witnesses. He also argues, even if the meeting with Dean McMahon was an appropriate "hearing," he did not receive notice this meeting would be his only opportunity to present evidence and argument in his defense.[6]

The University does not dispute Viriyapanthu had a sufficient liberty or property interest in continuing his education at UCLA Law School. Thus, the parties agree Viriyapanthu is entitled to the protections of the due process clause.[7] The parties disagree, however, about what process is due. **[page 11]**

As a threshold issue, the parties debate whether this matter should be treated as a "student misconduct" or an "academic dismissal" case. In a case in which a student is suspended from school for misconduct (i.e., some type of disruptive behavior), the law is clear the student is entitled to "*some* kind of hearing."[8] Misconduct cases generally "involve[] resolution of factual disputes" with "little

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[6] Viriyapanthu's claim he did not receive the hearing to which he was entitled is subject to de novo review. We review the trial court's factual findings under the substantial evidence standard. (*Rosenblit v. Superior Court* (1991) 231 Cal. App. 3d 1434, 1443, 282 Cal. Rptr. 819 [in mandamus proceedings brought under Code of Civil Procedure section 1085 or 1094.5, "foundational factual findings must be sustained if supported by substantial evidence; however, the ultimate determination of whether the administrative proceedings were fundamentally fair is a question of law to be decided on appeal"].)

[7] *Goss v. Lopez* (1975) 419 U.S. 565, 574-576, 42 L. Ed. 2d 725, 95 S. Ct. 729 (liberty and property interests implicated where public high school students were suspended); *Jaksa v. The Regents of the University of Michigan* (E.D.Mich. 1984) 597 F. Supp. 1245, 1247-1248 (student suspended from a state college had a liberty interest, and possibly a property interest, in the continuation of his education).

[8] See, e.g., *Goss v. Lopez*, *supra*, 419 U.S. at page 579.

need for subjective judgment or evaluation."[9] In contrast, where a student is dismissed from a university for failure to meet its academic standards (i.e., unsatisfactory academic performance), the student is not necessarily entitled to a hearing.[10] "Far less stringent procedural requirements" apply in this latter type of case because "the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking."[11] Because we conclude Viriyapanthu received all process due under the higher student misconduct standard, we need not decide whether this case falls within the student misconduct or academic dismissal camp.

Turning to our analysis of the due process requirements under the student misconduct standard, we note the United States Supreme Court has identified three factors which aid the determination of what process is due in a particular case: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, **[page 12]** of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."[12]

Courts have referred to *Goss v. Lopez* [13] as "the starting point" in an analysis of procedural due process requirements in student

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[9] *Jaksa v. The Regents of the University of Michigan*, *supra*, 597 F. Supp. at page 1248, footnote 2 (matter in which a student was suspended for one semester for cheating on a final examination should be treated as a student misconduct case rather than an academic dismissal case).

[10] See, e.g., *Board of Curators of the University of Missouri v. Horowitz* (1978) 435 U.S. 78, 85-86, 55 L. Ed. 2d 124, 98 S. Ct. 948.

[11] *Board of Curators of the University of Missouri v. Horowitz*, *supra*, 435 U.S. at pages 86, 90; see also *Napolitano v. The Trustees of Princeton University* (1982) 186 N.J.Super. 548 [453 A.2d 263, 271] (matter in which a private university withheld a student's degree for a year after she committed plagiarism was considered an academic dismissal case because it "concerned . . . the application of academic standards by the authorities of Princeton").

[12] *Mathews v. Eldridge* (1976) 424 U.S. 319, 334-335, 47 L. Ed. 2d 18, 96 S. Ct. 893.

[13] *Goss v. Lopez*, *supra*, 419 U.S. 565.

misconduct, public school suspension matters.[14] In that case, the United States Supreme Court decided what process is due in a case in which numerous public high school students were suspended for less than 10 days during "a period of widespread student unrest" (students were "demonstrating" and creating various "disturbances").[15] The court concluded public school "students facing suspension . . . must be given *some* kind of notice and afforded *some* kind of hearing."[16] More specifically, the court held "due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."[17] So long as there is "effective notice" and "an informal give-and-take between student and disciplinarian," the court left to the discretion of the disciplinarian whether to permit the presentation of witnesses, cross-examination, etc.[18] The court noted "longer suspensions or expulsions . . . may require more formal procedures."[19]

Courts applying *Goss* to longer term suspensions in student misconduct cases have recognized procedural due process is a flexible concept. The precise due process requirements depend upon the facts of a given case.[20] For example, "There are no hard and fast rules by which to measure meaningful notice. 'An elementary and fundamental **[page 13]** requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of

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[14] See, e.g., *Jaksa v. The Regents of the University of Michigan*, *supra*, 597 F. Supp. at page 1248.

[15] *Goss v. Lopez*, *supra*, 419 U.S. at pages 568-570.

[16] *Goss v. Lopez*, *supra*, 419 U.S. at page 579.

[17] *Goss v. Lopez*, *supra*, 419 U.S. at page 581.

[18] *Goss v. Lopez*, *supra*, 419 U.S. at pages 583-584.

[19] *Goss v. Lopez*, *supra*, 419 U.S. at page 584.

[20] See, e.g., *Nash v. Auburn University* (11th Cir. 1987) 812 F.2d 655, 660 (in a case in which students were charged with academic dishonesty (giving or receiving assistance during an examination), the court noted, "What process is due is measured by a flexible standard that depends on the practical requirements of the circumstances").

the pendency of the action and afford them an opportunity to present their objections.'"[21]

Although due process requires that students suspended for misconduct have the right to respond to the charges against them, students' "rights in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial."[22] "The primary purpose of a university is to educate its students. 'A school is an academic institution, not a courtroom or administrative hearing room.'"[23] "Where basic fairness is preserved," a full adversary proceeding with cross-examination of witnesses is not necessarily required.[24] The "opportunity to question witnesses" is not a key element of due process in a case "where **[page 14]** the proof is found in facts objectively discerned and not on inference from personal observations."[25]

"An impartial decision-maker" is another "essential guarantee of due process." [26] "School administrators who investigate allegations of misconduct against a student may participate in deliberations about whether the student should be disciplined, so long

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[21] *Nash v. Auburn University*, *supra*, 812 F.2d at page 661, quoting *Memphis Light, Gas & Water Division v. Craft* (1978) 436 U.S. 1, 13, 56 L. Ed. 2d 30, 98 S. Ct. 1554.

[22] *Nash v. Auburn University*, *supra*, 812 F.2d at page 664, citing *Goss v. Lopez*, *supra*, 419 U.S. at page 583; See *Foo v. The Trustees of Indiana University* (S.D. Ind. 1999) 88 F. Supp. 2d 937, 952 (in a school disciplinary proceeding, administrator complied with due process requirements where he gave the student notice of the charges against him, showed him the evidence supporting the charges, questioned the student about the alleged misconduct, and allowed the student to tell his side of the story).

[23] *Jaksa v. The Regents of the University of Michigan*, *supra*, 597 F. Supp. at page 1250, quoting *Board of Curators of the University of Missouri v. Horowitz*, *supra*, 435 U.S. at page 88.

[24] *Nash v. Auburn University*, *supra*, 812 F.2d at page 664; see also *Fain v. Brooklyn College of the City University of New York* (1985) 493 N.Y.S.2d 13 [112 A.D.2d 992, 993] ("A formal hearing is not required in the context of a student disciplinary proceeding. The student must be given notice of his alleged misconduct, be told the basis of the accusation against him, and be afforded an opportunity to explain his version of the facts").

[25] *Nash v. Auburn University*, *supra*, 812 F.2d at page 664; *Perlman v. Shasta Joint Junior College District Board of Trustees* (1970) 9 Cal. App. 3d 873, 883, 88 Cal. Rptr. 563 (a school board which expelled a student was not an impartial board because it made its decision prior to the hearing).

[26] *Nash v. Auburn University*, *supra*, 812 F.2d at page 665.

as they have no preexisting animus against the student."[27] However, "the government official charged with recommending a particular decision must not participate in making the actual decision, and the official who makes an initial decision must not participate in making the final decision."[28]

In this case, before Dean Cheadle referred the matter for disciplinary action, Viriyapanthu had two opportunities to present his side of the story to Dean Cheadle and Professor Spillenger. Moreover, a professor and a fellow law student of Viriyapanthu's choosing independently reviewed the research paper and one or more of the sources he allegedly copied without attribution. Dean Cheadle and Professor Spillenger apprised Viriyapanthu of all evidence against him. Then, after Viriyapanthu received formal, written notice of the charge against him, along with a copy of the Student Conduct Code explaining the procedures followed in disciplinary matters, Viriyapanthu had another **[page 15]** opportunity to present his side of the story to Dean McMahon, an impartial decision-maker.[29] We find the University provided Viriyapanthu all process due under the law.

Viriyapanthu argues the notice he received was insufficient because he did not know the meeting with Dean McMahon was his only opportunity to present evidence and argument in his defense. He believed he would be afforded a hearing before the Student Conduct Committee. Viriyapanthu was on notice of the procedures for disciplinary matters and the definition of plagiarism, as set forth in the Student Conduct Code. He cannot blame the University for his own

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[27] *Butler v. Oak Creek-Franklin School District* (E.D.Wis. 2001) 172 F. Supp. 2d 1102, 1115; *Gonzales v. McEuen* (C.D.Cal. 1977) 435 F. Supp. 460, 464 ("a limited combination of investigatory and adjudicatory functions in an administrative body [is not] necessarily unfair, absent a showing of other circumstances such as malice or personal interest in the outcome").

[28] *Butler v. Oak Creek-Franklin School District*, *supra*, 172 F. Supp. 2d at page 1115, citing *Withrow v. Larkin* (1975) 421 U.S. 35, 53-55, 43 L. Ed. 2d 712, 95 S. Ct. 1456.

[29] Viriyapanthu argues "the same individual who initiated the complaint, Professor Spillenger, was the same individual who formulated the punishment, and the aberrant opinion of one individual should not be allowed to ruin someone's life." Dean McMahon, not Professor Spillenger, was the decision-maker in this case. As discussed above, it is not improper for a person who investigates an allegation of misconduct to participate in deliberations about whether (and in what manner) the student should be disciplined. (*Butler v. Oak Creek-Franklin School District*, *supra*, 172 F. Supp. 2d at p. 1115.)

failure to familiarize himself with these procedures as well as the rules and regulations of the University.

Viriyapanthu admitted culpability in his meeting with Dean McMahon and therefore was not entitled to a hearing before the Student Conduct Committee. He argues the University's procedures are unfair because they do not allow him to challenge the allegation of dishonesty against him. As University officials explained to Viriyapanthu numerous times, dishonesty or an intent to deceive is not a necessary element of plagiarism under the Student Conduct Code. No university official accused Viriyapanthu of being intentionally dishonest. In any event, Viriyapanthu had several opportunities to explain he had not intended to deceive anyone. Dean McMahon took this into account in imposing the sanction.

Assuming Viriyapanthu was afforded a hearing before the Student Conduct Committee, it is not clear what additional evidence he could have presented in his defense. He references papers he submitted in other courses and professors who would have testified he did not commit plagiarism in preparing those papers. The fact he had **[page 16]** not committed plagiarism before is not relevant to whether he committed plagiarism in preparing his paper for Professor Spillenger's course. Moreover, he already admitted on numerous occasions his conduct in this instance satisfies the definition of plagiarism under the Student Conduct Code.

We cannot think of any additional procedures which would have (or could have) affected the outcome in this case. This simply is not a case in which the presentation and cross-examination of witnesses is necessary for a determination of what occurred or the resolution of factual disputes.[30] Moreover, based on our own review of the record, including Viriyapanthu's paper and excerpts from the McClain book, we conclude substantial evidence supports the trial court's finding Viriyapanthu committed plagiarism under the Student Conduct Code by copying verbatim or slightly paraphrasing material

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[30] Cf. *Dixon v. Alabama State Board of Education* (5th Cir. 1961) 294 F.2d 150, 158-159 ("the case before us requires something more than an informal interview with an administrative authority of the college . . . [because it] depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses"); *John A. v. San Bernardino City Unified School District* (1982) 33 Cal.3d 301, 306-307, 187 Cal. Rptr. 472, 654 P.2d 242 ("it was improper to expel plaintiff without the testimony of any of the witnesses to the altercation").

from the McClain book without attribution. For all of these reasons, we affirm the trial court's decision.

The judgment is affirmed. Respondent is entitled to recover its costs on appeal. NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J.

We concur:

PERLUSS, P.J. WOODS, J.

Viriyapanthu v. Regents of the University of California

B157836

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SEVEN

October 1, 2003, Decided

OPINION: Filed order denying petition for rehearing.

PAUL VIRIYAPANTHU, Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Respondent.

S120049

SUPREME COURT OF CALIFORNIA

December 10, 2003, Filed

OPINION: Petition for review denied.

STATUTORY PROVISIONS OF THE CALIFORNIA CODE OF CIVIL PROCEDURE

1085. (a) A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person.

1094.5. (a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal,corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner. Where the petitioner has proceeded pursuant to Section 68511.3 of the Government Code and the Rules of Court implementing that section and where the transcript is necessary to a proper review of the administrative proceedings, the cost of preparing the transcript shall be borne by the respondent. Where the party seeking the writ has proceeded pursuant to Section 1088.5, the administrative record shall be filed as expeditiously as possible, and may be filed with the petition, or by the respondent after payment of the costs by the petitioner, where required, or as otherwise directed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner

required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

UCLA STUDENT CONDUCT CODE

[page 7]

II. STUDENT CONDUCT POLICIES

Students are members of both society and the academic community with attendant rights and responsibilities. Students are expected to comply with the general law, University policies, and campus regulations.

A. Jurisdiction

The University shall have jurisdiction over student conduct that occurs on University property, or in connection with official university functions whether on or off University property. Although the University willnot routinely invoke its disciplinary processes over student conduct that occurs off campus except in connection with an official University function, the University shalol have discretion to exercise jurisdiction over conduct that occurs off campus and that would violate student conduct and discipline policies or regulations if the conduct had occurred on campus when:

(1) The alleged misconduct indicates the student poses a threat to the safety or security of any member(s) of the University community; or

(2) The alleged misconduct involves academic work or the forgery, alteration, misuse of any University document, record, key, electronic device, or identification.

[page 8]

Specifically, the University may choose to exercise jurisdiction over off-campus incidents under section (1) above where the alleged misconduct involves.

(a) Physical abuse, including but not limited to, rape, sexual assault, sex offenses, and other physical assault; threats of violence; or conduct that threatens the health or safety of any person;

(b) Stalking (as defined in Section 102.10 of the *University of California Policies Applying to Campus Activities, Organizations, and Students*);

(c) Sexual harassment (as defined in Section 102.09 of the *University of California Policies Applying to Campus Activities, Organizations, and Students*);

(d) Hazing or any method of initiation or pre-initiation into a campus organization or any activity engaged in by the organization or members of the organization which causes, or is likely to cause, bodily danger, physical harm, or personal degredation or disgrace resulting in physical or mental harm to any student or other person.

In determining whether or not to exercise off-campus jurisdiction in cases under section (1) above, the University will consider the seriousness of the alleged misconduct; whether the alleged victim is a member of the campus community; the ability of the University to gather evidence, including the testimony of witnesses; or whether the off-campus conduct is part of a series of actions that occurred both on and off campus.

This section is intended only to provide guidance for the exercise of discretion by the University in invoking its jurisdiction over conduct that occurs off campus. It may not be relied upon by any student charged under this section to create any rights, substantive or procedural, or as a basis for a challenge to the exercise of the University's jurisdiction.

B. Grounds for Discipline

The Chancellor may impose discipline for violation of, or an attempt to violate any University policies or campus regulations. The lack of intent to commit a violation is not a factor in determining **[page 9]** if a violation occurred; however, the lack of intent may be considered a

mitigating factor in determining the appropriate sanction if it has been determined that a violation has occurred. Violations or attempted violations include, but are not limited to, the following types of misconduct (note that the following section numbers 102.01 through 102.25 are adapted from the University of California Policies Applying to Campus Activities, Organizations, and Students):

C. Types of Misconduct

102.01: Academic Dishonesty

All forms of academic misconduct, including but not limited to, cheating, fabrication, plagiarism, or facilitating academic dishonesty.

For the purpose of this Code the, following definitions apply:

102.01a: Cheating

Cheating includes, but is not limited to, the use of unauthorized materials, information or study aids in any academic exercise; or, helping another student commit an act of academic fraud; or, the failure to observe the expressed procedures or instructions of an academic exercise, e.g., examination instructions regarding alternate seating or conversation during an examination.

102.01b: Fabrication

Fabrication includes, but is not limited to, falsification or invention of any information or citation in an academic exercise.

102.01c: Plagiarism

Plagiarism includes, but is not limited to, the use of another's words or ideas as if they were one's own; including, but not limited to representing, either with the intent to deceive or by

the omission of the true source, part of or **[page 10]** entire work produced by someone other than the student, obtained by purchase or otherwise, as the student's original work; or, representing the identifiable but altered ideas, data or writing of another person as if those ideas, data or writing were the student's original work.

[irrelevant provisions omitted]

[page 16]

III STUDENT DISCIPLINE PROCEDURES

The following procedures outlined in Sections III.A.1. through 9., represent the steps which may be employed to reach a resolution in cases of alleged misconduct. Questions concerning these procedures should be addressed to the Office of the Dean of Students, the Campus Ombuds Office, or Student Legal Services. Please note that each case is handled individually, and that, while due process is always employed, some of the procedures outlined hbelow may not be necessary in every case.

A. Dean of Students

1. Referral of Cases

Cases involving alleged misconduct of students shall be referred **[page 17]** to the Dean of Students' Office, except those in which the accused student is subject to an approved disciplinary procedure of a school, college, or other University unit. Cases falling within the above exception may also be referred to the Dean of Students' Office if such referral is provided for in the approved disciplinary procedures of the school, college, or other University unit. Referrals to the Dean of Students' Office shall be made within one year following

discovery of the alleged misconduct, although exceptions may be granted by the Vice Chancellor of Student Affairs.

No student may graduate until any pending disciplinary matter is fully resolved. The Dean of Students' may place a hold on that student's University records to prevent him or her from doing so.

2. Investigation and Notice to Student

Upon receiving notice of the alleged violation(s), the Dean assigned to the case may consider information acquired from a complainant and may augment that information through further investigation in order to determine if there is a reasonable suspicion to believe that a violation may have occurred.

In cases in where the Dean determines that there is not a reasonable suspicion to believe that a violation may have occurred, the Dean may decide that the case wilol not be pursued further by the Dean of Students' Office. The Dean may refer the matter to other campus and/or community resources (e.g. Ombuds Office, Campus Mediation Services, Student Psychological Services, UCLA Santa Monica Rape Treatment Center).

[irrelevant provisions omitted]

[page 18]

4. Inteview(s) with the Dean Assigned to the Case

The Dean assigned to the case shall, at the initial interview:

a. ascertain that the student has received a copy of this Code;
b. discuss conficentiality, inform the student that the content **[page 19]** of this and all subsequent communication with the Office regarding information not relevant to the case shall, insofar as allowed by law, be treated confidentially, unless such confidentiality is waived by the student; and that information relevant to the case may be divulged to those who

have a legitimate educational interest, including the Student Conduct Committee.

c. Describe to the student as completely as possible the nature of the conduct in question, and the University policy(ies) and/or campus regulation(s) allegedly violated, hear the student's defense to such charges, and counsel the student as appropriate;
d. Provide the student with an opportunity to inspect all documents relevant to the case which are in the possession of the Dean of Students' Office at the time of the interview; and
e. Provide the student with copies of the documents relevant to the case, at the student's request.

5. Copies of Relevant Documents

Should the case be referred to the Student Conduct Committee, the Dean of Students' Office shall provide the student with copies aof all documents relevant to the case whicha re in the possession of the Dean of Students' Office at the time the case is referred.

Any documents relevant to the case arriving in the Dean of Students' Office after the case has been referred to the Student Conduct Committee shall be forwarded to the Hearing Coordinator.

6. Disposition by the Dean of Students' Office

After meeting with the student, the Dean assigned to the case may take one of several actions:

a. Insufficient evidence

If the Dean concludes that there is insufficient evidence to sustain a finding of culpability, he or she may decide not to refer the case to the Student Conduct Committee. **[page 20]** The complainant may still attempt to resolve the matter through campus and/or community resources.

b. Agreement of Resolution

In cases in which the Dean and the accused student determine that an Agreement of Resolution is appropriate, the accused student will be informed that this Resolution, while not considered to be a finding of culpability, is binding; and that, if the student fails to abide by the directions in the Agreement of Resolution, that failure may be regarded as actionable misconduct…[remaining provision deleted]

c. Referral to the Student Conduct Committee

If the student does not admit culpability, and if the Dean concludes that an Agreement of Resolution is not appropriate, and that there is sufficient evidence so that a Student Conduct Committee could find, by a preponderance of the evidence, that the student has violated campus regulations, **[page 21]** the Dean shall refer the case to the Student Conduct Committee for a hearing.

d. Imposition of Sanctions

If the student does admit culpability, and if the Dean concludes that there is sufficient evidence to sustain a finding of culpability, the Dean may impose, or impose and suspend, one or more of the sanctions listed in Section III.A.7. below; the imposition of any sanction may be effective retroactively. No sanction involving separation from the University (i.e., Suspension or Dismissal) shall become official until five (5) days from the date appearing on the letter confirming the Dean's disposition.

[section omitted]

[page 25]

B. The Student Conduct Committee

1. Referral of Cases

The Student Conduct Committee shall provide a hearing for all cases referred to it under this Code.

2. Composition

The Student Conduct Committee shall consist of the following members and their alternates, all of whom are expected to serve from the effective date of their appointment, including recess periods between quarters or semesters and during summer periods:

a. Two members and two alternates from the faculty. One member and one alternate shall have training in the law or in the law or experience in the arbitration or adjudication of disputes…[following provisions omitted]
b. One undergraduate student and one graduate student, and one undergraduate and one graduate student alternate… [following provisions omitted] **[page 26]**
c. A fifth member and alternate to be appointed by the Chancellor from the staff, to serve for a period of time determined by the Chancellor.
d. A quorum shall consist of three members or alternates, one of whom must be the Chair or his or her alternate.

3. Orientation

The Chair shall be responsible for conducting an annual orientation for the Committee. The purpose of the orientation shall be to describe the nature of the Committee, including its charge, the standard of proof it is to employ, the nature ofr the offenses it is likely to hear and the evidence it may entertain, and its role as advisor to the Vice Chancellor of Student Affairs on questions of fact and sanction; to discuss its operation; and to familiarize the members with each aspect of this Code.

4. Scheduling of Hearing

It is the intention of this Code that hearings be set as soon as reasonably possible after referral to the Hearing Coordinator.

The Hearing Coordinator shall schedule a hearing of the case before **[page 27]** the Student Conduct Committee to be conducted no sooner than five (5) days, and no later than thirty (30) days after the date appearing on the letter of referral. The Hearing Coordinator shall give written notice of the time and place of the hearing to the student at least (3) days prior to the date of the hearing…[following provisions omitted]

5. Hearing Procedures and Standards

Hearings shall be held in accordance with generally accepted standards of procedural due process, including, but not limited to, the opportunity to present evidence in an orderly manner, and the right to examine and cross-examine witnesses. The accused student may choose to be represented by any person of the student's choice, at the student's own expense. Options for representation may be discussed with the Office of Student Legal Services or the Hearing Coordinator. The Committee Chair (or the Hearing Officer) shall rule on all questions of procedure. Evidence may be received of the sort upon which responsible persons are accustomed to rely in the conduct of serious affairs, and is not restricted to evidence admissible under the strict rules of evidence of a court of law.

As follows is the result of a Lexis Nexis search to demonstrate to this court the number of student discipline cases.

"goss" & "student" & "due process" & (susp! or exp!)	1035	Federal & State Cases, Combined	03/08/2004 13:39:20	Re-Run/Edit

OPPOSITION

BRIEF

No. 03-1292

In The
Supreme Court of the United States

PAUL VIRIYAPANTHU,

Petitioner,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Second District Court Of Appeals, For The State Of California, Division Seven

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED

Does due process of law require that a university student charged with plagiarism be afforded a full adversarial hearing that includes the right to present evidence and cross-examine witnesses, where the student: (a) is provided with notice and an explanation of the charge; (b) is afforded a formal opportunity to present his side of the story to an impartial decision-maker; and (c) admits the acts constituting the plagiarism?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTRODUCTION	1
STATEMENT OF THE CASE	2
I. UCLA STUDENT CONDUCT CODE PROVISIONS AT ISSUE	2
II. FACTS (AS RECITED BY STATE APPELLATE COURT)	3
III. STATE COURT PROCEEDINGS	6
IV. ISSUE FOR REVIEW	8
REASONS FOR DENYING THE PETITION	10
I. DUE PROCESS IS AN INHERENTLY FLEXIBLE CONCEPT THAT IS NOT SUSCEPTIBLE TO THE APPLICATION OF MECHANICAL RULES	10
II. THERE IS NO "CONFUSION" AMONG FEDERAL OR STATE COURTS CONCERNING DUE PROCESS IN STUDENT DISCIPLINE CASES	11
A. *GOSS V. LOPEZ*: "THE STARTING POINT"	11
B. COURTS HAVE CONSISTENTLY APPLIED DUE PROCESS PRINCIPLES IN UNIVERSITY STUDENT MISCONDUCT CASES FOR OVER FORTY YEARS	12
C. PETITIONER MISAPPREHENDS THE DUE PROCESS CASES HE CITES	14

TABLE OF CONTENTS – Continued

		Page
III.	DUE PROCESS DOES NOT REQUIRE A FORMAL ADVERSARIAL HEARING ON THE SEVERITY OF THE SANCTION IMPOSED	17
IV.	UCLA POLICIES DO NOT PREVENT A STUDENT FROM CHALLENGING ALLEGATIONS OF DISHONESTY	19
V.	THE STATE COURTS IMPOSED NO REQUIREMENT OF "CERTAINTY OF SUCCESS"	20
VI.	THE PETITION RAISES NO ISSUE OF NATIONAL IMPORTANCE REQUIRING RESOLUTION BY THIS COURT	21
VII.	THIS IS AN INAPPROPRIATE CASE FOR ADDRESSING THE ISSUES RAISED IN THE PETITION	22
CONCLUSION		23

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Betts v. Board of Education, 466 F.2d 629 (7th Cir. 1972) 16, 17, 18

Butler v. Oak Creek-Franklin School District, et al., 172 F. Supp. 1102 (E.D.Wis. 2001) 18

Board of Regents of State Colleges, et al. v. Roth, 408 U.S. 564 (1972) 8, 9, 20

Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886 (1961) 10

Carey on behalf of Carey v. Maine School Administrative District #17, 754 F. Supp. 906 (D. Me. 1990) 10, 16

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 18

Cornette, et al. v. Aldridge, 408 S.W.2d 935 (1966) 14

Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967) 14

Fain, et al. v. Brooklyn College of the City University of New York, et al., 493 N.Y.S.2d 13 (1985) 13

Foo v. Indiana University, 88 F. Supp.2d 937 (S.D. Ind. 1999) 13, 17

Goss v. Lopez, et al., 419 U.S. 565 (1975) 11, 12, 16

Mathews v. Eldridge, 424 U.S. 319 (1976) 10

Morrissey v. Brewer, 408 U.S. 471 (1972) 10

Nash v. Auburn University, 812 F.2d 655 (11th Cir. 1987) 13

St. John Dixon v. Alabama State Board of Education, et al., 294 F.2d 150 (5th Cir. 1961) 12, 13, 15, 22

TABLE OF AUTHORITIES – Continued

Page

Wood v. Strickland, 420 U.S 308, reh'g denied, *Wood v. Strickland*, 421 U.S. 921 (1975), overruled in part on other grounds, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) 17

STATE CASES

Beehan, et al. v. Lido Aisle Community Association, 70 Cal. App.3d 858 (1977) 7

Denham v. Superior Court, 2 Cal.3d 557 (1970) 7

Ishimatsu v. Regents of the University of California, 266 Cal. App.2d 854 (1968) 19

Napolitano v. Trustees of Princeton University, 186 N.J. Super. 548 (1982) 17

Rosenblit v. Superior Court, 231 Cal. App.3d 1434 (1991) 7

State of Ohio v. Barron, 52 Cal. App.4th 62 (1997) 7

Smith v. Fresno Irrigation District, 72 Cal. App.4th 147 (1999) 7

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INTRODUCTION

This case involves a university disciplinary proceeding for plagiarism against Petitioner, then a law student at the University of California, Los Angeles (UCLA). Petitioner challenges a state court holding that is both narrow in its application and based on long-established judicial precedent. The state court held that Petitioner was provided adequate due process of law, where he was given: (1) formal written notice of the plagiarism charge; (2) an opportunity to present his side of the story to his professor and the law school Dean; (3) independent review of the law school paper at issue; and (4) an opportunity to present his side of the story to an impartial decision-maker (the Associate Dean of Students) in a formal meeting (at which he admitted culpability). Petitioner's Appendix (Pet. App.) at A-16.

Petitioner argues that he should have been afforded a formal adversary hearing with the opportunity to present evidence and examine witnesses.[1] However, an unbroken line of federal and state judicial precedent holds that a judicial-type adversary hearing is *not* required in student discipline cases. The immutable requirements of due process in such cases are adequate notice and a meaningful opportunity to be heard. The state court found that

[1] The Petition frames that question as whether Petitioner should be entitled to "even an informal adjudicative type hearing." (Pet. at i) It is not clear what is meant by an "informal adjudicative type hearing"; however, in the trial court and in the appellate court Petitioner demanded a formal hearing before the UCLA Student Conduct Committee, complete with presentation of evidence and examination of witnesses. Indeed, in this Petition he seeks the right to present evidence and call witnesses.

both had been provided to Petitioner. That holding is completely consistent with Supreme Court precedent and requires no further review by this Court.

STATEMENT OF THE CASE

I. UCLA STUDENT CONDUCT CODE PROVISIONS AT ISSUE

Plagiarism is a serious problem in higher education. UCLA, like many universities, includes plagiarism among the types of misconduct governed by the Student Conduct Code. The Code defines plagiarism as follows:

> Plagiarism includes, but is not limited to, the use of another's words or ideas as if they were one's own; including, but not limited to representing, either with the intent to deceive or by the omission of the true source, part of or an entire work produced by someone other than the student, obtained by purchase or otherwise, as the student's original work; or, representing the identifiable but altered ideas, data or writing of another person as of those ideas, data or writing were the student's original work.

Pet. App. at A-25-26.[2] As at many universities, intent is not a required element of plagiarism under the Code.[3]

[2] Student Conduct Code Section II(C)102.01c.

[3] The record before the trial court and appellate court showed that plagiarism is addressed in several UCLA publications for students, and that the Law School discusses plagiarism and warns of its consequences in a document distributed to all students.

The Student Conduct Code provides that every student accused of misconduct must be given written notice of the charge and an opportunity to present his or her side of the story in a formal meeting with the Dean of Students. Pet. App. at A-27-28.[4] If the student admits culpability at that meeting, the Dean may impose a sanction without a formal adversary hearing. Pet. App. at A-29.[5] If the student denies the charges and the Dean believes there is sufficient evidence to support the charge, the matter is referred to the Student Conduct Committee for a judicial-type adversary hearing at which the student may be represented by counsel, present evidence and cross-examine witnesses. Pet. App. at A-29.[6]

II. FACTS (AS RECITED BY STATE APPELLATE COURT)

In early 1999, a professor at the University of California, Los Angeles ("UCLA") School of Law discovered that portions of a paper submitted by Petitioner had been copied from other sources. He informed the Assistant Dean of the Law School and they met with Petitioner. Petitioner said that he had too many papers to write at the end of the semester and had been pressed for time; he had cut and pasted research from his computer and become confused about what work was his and what was others'. He said he had not committed plagiarism because he had not intended to deceive. The Dean and professor reminded him

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[4] Student Conduct Code Section III(A)(2), (4).

[5] Student Conduct Code Section III(A)(6)(d).

[6] Student Conduct Code Section III(A)(6)(c), III(B).

that intent is not an element of plagiarism under the Student Conduct Code. Pet. App. at A-6.

Although it was not required, the Dean agreed to Petitioner's request that his paper be reviewed by individuals of his own choosing. Both of the individuals consulted concluded that the paper clearly had been plagiarized. Pet. App. at A-6-7. The matter was referred to the Dean of Students, who notified Petitioner of the plagiarism charge in writing and warned that, if substantiated, the conduct would violate the Student Conduct Code. The letter instructed Petitioner to contact the Dean, and enclosed a copy of the Student Conduct Code. Pet. App. at A-7-8.

Pursuant to the Student Conduct Code, the Associate Dean of Students held a formal meeting with Petitioner concerning the plagiarism charge. Petitioner was accompanied by his attorney. Pet. App. at A-8. Petitioner claims that he was unaware that this meeting was to be anything more than an "explanation" of University procedures. However, the Student Conduct Code, which Petitioner admitted receiving prior to his meeting with the Dean, clearly states that one purpose of the meeting is for the Dean to hear a student's defense. Pet. App. at A-28.[7] The Code also states that if a student admits culpability at this meeting, the Dean may impose a sanction and no formal hearing before the Student Conduct Committee is required. Pet. App. at A-29.

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[7] Student Conduct Code Section III(A)(4)(c).

At the meeting, the Dean reviewed the allegation of plagiarism with Petitioner and his attorney and asked Petitioner to present his explanation of the events. Neither Petitioner nor his attorney contested the plagiarism allegation: in fact, he admitted that the paper included passages taken nearly verbatim from another source without acknowledging that source. He admitted that he had made an error in judgment, that he never should have submitted the paper as written, and took full responsibility for his actions. The Dean advised Petitioner that his actions constituted plagiarism under the Student Conduct Code and that an appropriate sanction would need to be imposed. Petitioner said that he had not intended to plagiarize; the Dean reminded him and his attorney that under the Student Conduct Code, intent is not a factor in determining whether plagiarism had occurred. Pet. App. at A-9.

The Dean informed Petitioner that she would give careful consideration to an appropriate sanction, confer with the Law School, and meet with him again to discuss the sanction. At the Dean's suggestion, Petitioner wrote a statement for the file: in it he admitted wrongdoing, assumed full responsibility for his actions and set forth his mitigating circumstances (he had been tired, pressed for time and careless). Pet App. at A-9-10.

The Dean determined that the appropriate sanction would be suspended dismissal, a retroactive suspension for Fall Semester 1998 and 300 hours of community service in a project of Petitioner's own choosing. Pet. App. at A-10. The Dean met with Petitioner and his attorney to inform them of the sanction, and followed up with written notice. Pet. App. at A-10. As permitted under the Student Conduct Code, Petitioner appealed the suspension to the Vice

Chancellor of Student Affairs. He again admitted wrongdoing, stated that there had been no improprieties in the decision-making process and accepted full responsibility. He provided a detailed written explanation of his position (including his mitigating circumstances). After carefully reviewing the disciplinary file and Petitioner's letter, the Vice Chancellor concluded that the plagiarism finding was correct and that the suspension was appropriate. He communicated this in writing to Petitioner. Pet. App. at A-10-11.

Petitioner completed the terms of the sanction and subsequently graduated from UCLA Law School. He is currently a member of the California Bar.

III. STATE COURT PROCEEDINGS

On September 27, 2001, Petitioner filed a petition for writ of administrative mandate seeking to have the plagiarism finding overturned on the ground that he had not been provided due process of law. Petitioner claimed that he should have been provided with a full adversarial hearing and allowed to present witnesses. The trial court denied the petition, finding that a judicial-type hearing was not required. The court found that due process of law was satisfied because petitioner had been provided "with notice and an opportunity to tell his side of the story." Pet. App. at A-2. The California Court of Appeal affirmed, in an unpublished decision. The California Supreme Court denied review. Undeterred, Petitioner now appeals to this Court.

This case is not "a pure matter of law" as Petitioner suggests. Although he states that "there are very few

factual disputes" (pet. at 30), this is far from true. Respondent submitted six declarations and multiple exhibits in the trial court refuting Petitioner's version of the facts, all of which were admitted into evidence. Under California law this case presents a mixed question of law and fact. Whether or not Petitioner was entitled to a formal adversary hearing is a question of law that is reviewed de novo. See *Rosenblit v. Superior Court*, 231 Cal. App.3d 1434, 1442-43 (1991); see also *State of Ohio v. Barron*, 52 Cal. App.4th 62, 67 (1997) (constitutional issues reviewed de novo). However, the determination of basic foundational facts is reviewed on appeal under the deferential substantial evidence standard. (Id.; see also *Smith v. Fresno Irrigation District*, 72 Cal. App.4th 147, 156-57 (1999) (in mixed question of law and fact "questions of fact are reviewed by giving deference to the trial court's decision").

Under California law, on appeal the trial court's decision is presumed to be correct. *Denham v. Superior Court*, 2 Cal.3d 557, 564 (1970). Any ambiguity in the record must be resolved in favor of the respondent. If no statement of decision is requested (as was the case here), the appellate court will presume that the trial court made all necessary findings to support the judgment. *Beehan, et al. v. Lido Aisle Community Association*, 70 Cal. App.3d 858, 861 (1977); *Tusher, et al. v. Gabrielsen, et al.*, 68 Cal. App.4th 131, 140 (1998). Here, the appellate court concurred in the trial court's presumed factual findings: its decision included a nearly eight-page recitation of the facts. Pet. App. at A-4-12.

IV. ISSUE FOR REVIEW

Petitioner casts the issue for review in two parts. The first is whether it was error for the appellate court to hold that "a student facing expulsion or long-term suspension from a public university is only entitled to an opportunity to 'explain his side of the story' to a school official, and has no right to present evidence and witnesses at, nor can insist upon, even an *informal* adjudicative type hearing." The second is whether a law student disciplined "on a charge which constitutes a finding of moral turpitude" is sufficiently stigmatized to implicate the "occupational liberty" cases represented by *Board of Regents of State Colleges, et al. v. Roth*,[8] 408 U.S. 564 (1972), "such as to justify even an informal hearing, with the ability to present evidence and witnesses, to challenge any allegations of 'dishonesty'" Pet. at i.

With respect to the first issue, Petitioner misstates the appellate court's holding. The court held that in the narrow circumstances presented, Petitioner was afforded due process of law. Petitioner was suspended after (i) notice of the plagiarism charge, (ii) a formal meeting (accompanied by his attorney) with the Dean, at which he had the opportunity to present a defense and admitted that he had committed the acts constituting plagiarism, (iii) a 10-day period in which the Dean took the time to formulate an appropriate sanction, and (iv) a second formal meeting with the Dean at which the proposed sanction was discussed. Pet. App. at A-16.

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[8] Petitioner incorrectly calls the decision *Roth v. Board of Regents*.

With respect to the second issue, the trial court found that even if a liberty interest is implicated, Petitioner still was afforded all process due him under the law. Pet. App. at A-2. The appellate court assumed that a liberty interest existed so as to trigger the due process clause, and held that Petitioner had been afforded all the process he was due. Moreover, *Roth* holds that even where such a liberty interest is asserted, due process requires only notice and an opportunity to be heard. See "Reasons for Denying Petition," Section IV, *infra*.

The issue is thus not whether The Regents can suspend or dismiss a student without *any* type of hearing or opportunity to present evidence. In framing the issue as such, Petitioner continues to make the same error he made in the trial court and appellate court: he equates "hearing" with a full-blown judicial-type adversary proceeding. As shown below (and as the state courts recognized), this is simply not how the courts define an "opportunity to be heard" for due process purposes.

Correctly framed, the issue for review is whether Petitioner, who received written notice of the plagiarism charge and a fair opportunity to respond before an impartial decision-maker, and who admitted culpability, is entitled to a full adversarial hearing with the opportunity to present evidence and cross-examine witnesses.

REASONS FOR DENYING THE PETITION

I. DUE PROCESS OF LAW IS AN INHERENTLY FLEXIBLE CONCEPT THAT IS NOT SUSCEPTIBLE TO THE APPLICATION OF MECHANICAL RULES

Due process of law is an inherently fluid concept not susceptible to the application of mechanical rules. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961). Its scope is determined by "the nature of the interest affected and the context in which the deprivation of the interest occurs." *Carey on behalf of Carey v. Maine School Administrative District #17*, 754 F. Supp. 906, 918 (D. ME. 1990).

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Because of the fluid nature of due process, it is not possible to impose a mechanical rule applicable in all situations. Student discipline cases vary widely: whether due process has been met is a question that can only be answered through an examination of the facts and circumstances of the particular case at issue. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers, supra*, 367 U.S. at 895.

II. THERE IS NO "CONFUSION" AMONG FEDERAL OR STATE COURTS CONCERNING DUE PROCESS IN STUDENT DISCIPLINE CASES

Petitioner claims that there is "a state of confusion in the lower state and federal courts" concerning the amount of due process to which a student is entitled before being subject to a long suspension or expulsion. Pet. at 17-20. However, what Petitioner casts as "confusion" is merely the necessary and appropriate adjudication of the application of the due process doctrine to particular facts and circumstances. What does not vary is the principle enunciated by virtually every state and federal court: due process requires adequate notice and a meaningful opportunity to be heard.

A. *GOSS V. LOPEZ*: "THE STARTING POINT"

As the state court observed, *Goss v. Lopez, et al.*, 419 U.S. 565 (1975) is the "'starting point'" in an analysis of procedural due process requirements in student misconduct, public school suspension matters." Pet. App. at A-13. *Goss* involved the 10-day suspension of Ohio public high school students for disruptive or disobedient conduct. The Court held that due process requires "*some* form of notice and *some* kind of hearing" where student is facing suspension. 419 U.S. at 579. Consistent with other due process cases, the Court stated that: "the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved." 419 U.S. at 579.

In the circumstances before it (a 10-day suspension), the Court held that: "due process requires . . . that the student be given oral or written notice of the charges

against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." 419 U.S. at 581. The Court made it clear, however, that a full judicial-type hearing is not required: in the case of short suspensions "there [must] be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension." The Court also stated that its holding related only to short suspensions not exceeding ten days: "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." 419 U.S. at 584.

B. COURTS HAVE CONSISTENTLY APPLIED DUE PROCESS PRINCIPLES IN STUDENT MISCONDUCT CASES IN THE UNIVERSITY SETTING FOR OVER FORTY YEARS

Petitioner asks this Court to formulate a new rule requiring full judicial-type hearings in all cases involving long-term suspensions or expulsions from a public university. Respondent respectfully submits that both federal and state courts have consistently applied the standard principles of due process in such cases for over forty years, and there is no need for further intervention by this Court.

Student misconduct cases in the college or university setting are governed by a long line of decisions beginning with *St. John Dixon v. Alabama State Board of Education, et al.*, 294 F.2d 150 (5th Cir. 1961). That case involved the

expulsion of a group of students without any notice or opportunity to be heard, or even an explanation of why they had been expelled.[9] The Fifth Circuit held that students faced with expulsion from a public university are entitled to "notice and some form of hearing." (Id. at p. 158.) However, the court stated that a "full-dress judicial hearing, with the right to cross-examine witnesses," is not required, as it may be "detrimental to the college's educational atmosphere and impractical to carry out." 294 F.2d at 159. If the student is given notice, the names of witnesses against him and an opportunity to present, "at least to an administrative official of the college," a defense, due process has been satisfied. Id.

Since *Dixon*, the courts – both state and federal – have uniformly held that a formal adversary proceeding is *not* required as long as the student is given notice of the charges and a fair chance to present his or her side of the story. See, e.g., *Nash v. Auburn University*, 812 F.2d 655, 664 (11th Cir. 1987) ("where basic fairness is preserved, we have not required the cross-examination of witnesses and a full adversary proceeding . . . [students'] rights in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial . . . ."); *Foo v. Indiana University*, 88 F. Supp.2d 937, 954 (S.D. Ind. 1999) (notice of charges and meeting with university administrator comported with due process standards); *Fain, et al. v.*

[9] The appellate court noted that "the misconduct for which the students were expelled has never been definitely specified." 294 F.2d at 151. It emerged that the students had participated in a sit-in at a lunch counter in Montgomery, Alabama, and some of them had demonstrated peacefully on the steps of the State Capitol.

Brooklyn College of the City University of New York, et al., 493 N.Y.S.2d 13, 14, 112 A.D.2d 992, 993 (1985) ("[a] formal hearing is not required in the context of a student disciplinary proceeding. The student must be given notice of his alleged misconduct, be told the basis of the accusation against him, and be afforded an opportunity to explain his version of the facts"); *Cornette, et al. v. Aldridge*, 408 S.W.2d 935, 942 (1966) ("a fair hearing before school officials does not contemplate a trial as in a chancery court or a court of law. The student should be given every fair opportunity of showing his innocence"); *Esteban v. Central Missouri State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967) ("students are entitled to know the ground or grounds upon which the college is considering taking disciplinary action, should be afforded an opportunity to appear before the person or persons responsible for taking disciplinary action and make such a showing or explanation as they wish to make, and should be advised in some adequate manner of the evidence against them").

The fundamental principles of due process as repeatedly enunciated by this Court have been uniformly applied in student discipline cases: if the results have varied, it is because each case has unique facts and circumstances. There is no need for Supreme Court intervention in this process.

C. PETITIONER MISAPPREHENDS THE DUE PROCESS CASES HE CITES

Petitioner cites a flurry of student discipline cases from various jurisdictions in an attempt to show that there

is confusion over whether a formal judicial-type hearing is required,[10] with the right to present evidence and cross-examine witnesses, or simply an informal meeting with school officials. Pet. at 17-29. According to Petitioner: "Some courts have held that an 'adjudicative type' hearing is not required and that an informal meeting with a school official is sufficient, while other courts have required more stringent procedures." Pet. at 17.

Unfortunately, Petitioner misapprehends the due process holdings of the cases he cites. Virtually all of those cases affirm the fundamental principles that: (1) due process requires only notice and an opportunity to be heard; and (2) what process is due varies with the facts and circumstances of each case. The courts then go to apply the principles in the context of the particular facts before them: that is why the results are varied. In none of those cases does a court say that a full judicial-type hearing is always required in a student discipline case.

In nearly every case cited by Petitioner, the student denied the charges against him or her. In many of those cases, a finding turned on the testimony of witnesses or other extrinsic evidence. Those cases are inapposite: here, Petitioner *admitted* the conduct giving rise to the plagiarism charge. Pet. App. at A-8, 17.

One of the basic functions of a hearing in general misconduct cases is to resolve factual disputes and reconcile divergent witness accounts. See *Dixon*, *supra*, 294 F.2d

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[10] Petitioner uses the term "adjudicative type hearing" throughout the Petition. From the context, Respondent assumes this to mean a formal judicial-type hearing.

at 159 ("[b]y its nature, a charge of misconduct . . . depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses"). Even cheating, depending as it often does upon the observations of witnesses, may turn on the resolution of factual disputes and witness accounts. Plagiarism, however, involves not general misconduct or conflicting witness accounts (there are generally no witnesses) but an academic determination based on the student's written work and the explanation of the student himself.

Moreover, where, as here, a student *admits* culpability, a formal adversary hearing to obtain a factual determination of culpability is not necessary. See *Goss*, *supra*, 419 U.S. at 739 (student entitled to notice of charges and, "*if he denies them*," explanation of evidence and chance to present his side of the story) (emphasis added); *Betts v. Board of Education*, 466 F.2d 629, 633 (7th Cir. 1972) (where student admitted misconduct, "the function of procedural protections in insuring a fair and reliable determination of the retrospective factual question . . . is not essential"); *Carey*, *supra*, 754 F. Supp. at 920 (student's confession to mother and school principal "eliminates any doubts as to the facts upon which his discharge was based").

Petitioner argues that he "should have been given the choice as to whether he wished to retract his statements and challenge the accusation of plagiarism before the Student Conduct Committee." Pet. at 7. In other words, Petitioner, having admitted to using someone else's work without attribution, in a formal disciplinary meeting where he was represented by counsel, now claims that due process entitles him to retract that statement and say the

opposite. No rational concept of due process entitles Petitioner to such a request.

III. DUE PROCESS DOES NOT REQUIRE A FORMAL ADVERSARIAL HEARING ON THE SEVERITY OF THE SANCTION IMPOSED

Petitioner claims that he should have received a formal adversary hearing on the severity of the sanction. Pet. at pp. 14-15. In fact, the courts have consistently declined to pass on the particular form of discipline imposed by school authorities. See *Wood v. Strickland*, 420 U.S 308, 326, reh'g denied, *Wood v. Strickland*, 421 U.S. 921 (1975), overruled in part on other grounds, *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) ("[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion . . . .The system of public education that has evolved in this nation relies necessarily on the discretion and judgment of school administrators"); *Betts, supra*, 466 F.2d at 633 ("the meting out of disciplinary punishment is a matter left largely to the discretion of the school authorities . . . ."); *Foo, supra*, 88 F. Supp.2d at 965 ("any doubts [the court] may have about the wisdom of I.U.'s actions are not relevant"); *Napolitano v. Trustees of Princeton University*, 186 N.J. Super. 548, 573 (1982) (judge who personally disagreed with sanction imposed correctly refrained from substituting his views for those of university administration).

The *Betts* court held that a student facing expulsion (a far more serious penalty than a one-semester suspension) should be allowed to present mitigating circumstances; however, this requirement was met where the student had

explained the mitigating circumstances at the same meeting (with the school's administrative assistant and counselor) in which she admitted culpability. (466 F.2d at 633.)

Petitioner cites two cases for the proposition that a hearing is required to determine the severity of a sanction. In both, he misinterprets the requirement of a "hearing." The first case he cites, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), involved an employee who was discharged for failing to disclose a felony conviction on a job application. Although *Loudermill* held that a "hearing" was required before the employee could be discharged, the Supreme Court made it clear that a formal adversarial hearing was *not* required:

> The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

470 U.S. at 546.

The second case cited by Petitioner, *Butler v. Oak Creek-Franklin School District, et al.*, 172 F. Supp. 1102 (E.D.Wis. 2001), involved the suspension of a high school student for various disciplinary reasons. Again, although the court found that a "hearing" was required in determining the appropriate punishment, it stated only that " 'the student [must] at least have the opportunity to characterize his conduct and put it in the proper context' before a final decision is made." Id., at p. 1114 (citation omitted).

Petitioner had exactly that. He was represented by counsel at his second meeting with the Dean at which the proposed sanction was discussed, and he had already submitted a detailed statement of his mitigating circumstances. He appealed the sanction (again admitting wrongdoing) and presented his mitigating circumstances in a detailed letter to the Vice Chancellor. The Vice Chancellor reviewed the file carefully and concluded that the sanction was appropriate. Petitioner received all the due process to which he was entitled with respect to the sanction imposed.

IV. UCLA POLICIES DO NOT PREVENT A STUDENT FROM CHALLENGING ALLEGATIONS OF DISHONESTY

Petitioner argues that that UCLA's policy is "unfair" because it prohibits a student from challenging allegations of dishonesty. He claims that intent is a necessary element of dishonesty, and that he should have been allowed to present "exculpatory evidence as to intent." Pet. at pp. 8-10. However, intent is not an element of the infraction of plagiarism under the UCLA Student Conduct Code, and Petitioner was on notice of this.[11] A student may argue lack of intent as a mitigating circumstance under the Code: Petitioner did so and his arguments were carefully considered. The appellate court found that "no university official ever accused [Petitioner] of being dishonest," that Petitioner "had several opportunities to explain he had not

[11] University of California policies have the force of statute. *Ishimatsu v. Regents of the University of California*, 266 Cal. App.2d 854, 863-64 (1968).

intended to deceive anyone," and that "[the Dean] took this into account in imposing the sanction." Pet. App. at A-17.

Nevertheless, Petitioner argues that because he has been "stigmatized" by the charge of dishonesty, this case falls within the scope of *Board of Regents v. Roth*, *supra*, 408 U.S. at 573, which states (in dicta) that if the government makes a "stigmatizing charge" in connection with an employee termination, the employee is entitled to an opportunity to refute the charge. However, all that *Roth* requires is that, "where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential . . . in such a case, due process would accord an opportunity to refute the charge before University officials." Id. Petitioner received notice and an opportunity to be heard and to refute the plagiarism charge before University officials. *Roth* requires no more.

V. THE STATE COURTS IMPOSED NO REQUIREMENT OF "CERTAINTY OF SUCCESS"

Petitioner claims that the trial and appellate courts "reject[ed] Petitioner's claim that he had a right to present evidence and witnesses because Petitioner could not demonstrate that he would have been successful had a hearing occurred." Pet. at 11-12. Again, Petitioner seems to have misunderstood the comments in the courts below. The trial court's comment he cites did not impose any certainty requirement; it appears to be a response to the court's invitation to Petitioner during the hearing to identify the evidence he claimed he had been prevented from offering. Petitioner was unable to do so in any coherent fashion.

The portions of the appellate court opinion cited by Petitioner also impose no "certainty" requirement. The court discussed the fact that "the 'opportunity to question witnesses' is not a key element of due process in a case 'where the proof is found in facts objectively discerned and not on inferences from personal observations' . . . ." Pet. at 12, citing Pet. App. at A-15. The court then remarked that Petitioner had not adduced any evidence that would have required the questioning of witnesses. Again, this seems to be a response to the appellate court's invitation to Petitioner during oral argument to identify the evidence he claimed he had been prevented from presenting. As in the trial court proceeding, Petitioner was unable to do so in any coherent fashion.

VI. THE PETITION RAISES NO ISSUE OF NATIONAL IMPORTANCE REQUIRING RESOLUTION BY THIS COURT

The decision by the state court narrowly holds only that Petitioner, in the specific circumstances of his disciplinary proceeding, was afforded due process of law. The issue before the court involved not a University-wide policy, but the Student Conduct Code of a single campus. It involved a single academic infraction—plagiarism. It involved a narrow set of circumstances wherein the student *admitted* the charged misconduct. The court's opinion is specific to those facts, and has no wider application. Moreover, the opinion was not published and thus has no precedential effect. Under those circumstances, review by this Court is neither necessary nor appropriate.

VII. THIS IS AN INAPPROPRIATE CASE FOR ADDRESSING THE ISSUES RAISED IN THE PETITION

Respondent respectfully suggests that this case is not suitable for review by this Court. Petitioner mistakenly equates the abundance of student discipline cases with an absence of guidance from this Court concerning long suspensions or expulsions. That is not true, for at least two reasons. First, the cases cited by Petitioner reflect not an absence of guidance but the necessary variety in due process determinations based on different facts and circumstances. Second, as shown above, both federal and state courts have consistently applied due process requirements in student cases involving long suspensions or expulsions for over forty years, beginning with *Dixon*.

Petitioner argues for a blanket requirement of a full adversary hearing in all cases of long suspensions or expulsions. As shown above, that would stand forty years of established jurisprudence on its head and contravene well-established Supreme Court precedent on the flexibility of the due process concept. Moreover, Petitioner asks this Court to impose a blanket rule in a case involving circumstances rarely seen in student discipline cases: a student who has admitted the charges against him, on an infraction that is essentially solitary and not dependent on witness testimony, and who still demands an adversary hearing with the right to call witnesses. Respondent respectfully submits that this case is not appropriate for

the establishment of the blanket rule sought by Petitioner.[12]

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Court deny the Petition.

Dated: April 12, 2004

Respectfully submitted,

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Attorneys for Respondent
The Regents of the
University of California

[12] It should be noted in passing that the fact that Petitioner "is not asking for that much by way of procedural protection" (pet. at 30) is immaterial to whether a petition for certiorari should be granted. The same is true for his statement that "this is not an unreasonable request." Id.